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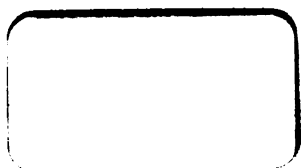
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A DIGEST
OF
The Laws of England
RESPECTING
REAL PROPERTY.

VOL. III.

A
DIGEST
OF
The Laws of England
RESPECTING
REAL PROPERTY.

BY WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

THE SECOND EDITION, REVISED AND ENLARGED.

VOLUME THE THIRD,

CONTAINING

Title 21. ADVOWSON.
22. TITHES.
23. COMMON.
24. WAYS.
25. OFFICES,
26. DIGNITIES.

Title 27. FRANCHISES.
28. RENTS.
29. DESCENT.
30. ESCHEAT.
31. PRESCRIPTION.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY ;
FOR J. BUTTERWORTH AND SON, FLEET-STREET,
AND
J. COOKE, DUBLIN.
1818.

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OF THE

THIRD VOLUME.

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A DIGEST
OF
The Laws of England
RESPECTING
REAL PROPERTY.

TITLE XXI.

ADVOWSON.

CHAP. I.

Of the Origin and Nature of Advowsons.

CHAP. II.

Of Presentation, Institution, and Induction.

CHAP. I.

Of the Origin and Nature of Advowsons,

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| 4. <i>Origin of Advowsons.</i> | 24. <i>What Estate may be had therein.</i> |
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| 19. <i>Presentative.</i> | 41. <i>Is Assets for Payment of Debts.</i> |
| 20. <i>Collative.</i> | |
| 21. <i>Donative.</i> | |

SECTION 1.

Of incorporeal
Property.

HAVING treated, in the preceding titles, of corporeal property, it will now be necessary to discuss the nature of incorporeal hereditaments, and the rules by which they are governed.

2 Comm. 20.

2. Incorporeal hereditaments consist of rights and profits arising from or annexed to lands. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. *Hæreditas alia corporalis, alia incorporalis: corporalis est quæ tangi potest et videri; incorporalis, quæ tangi non potest nec videri.*

1 Inst. 9 a.

3. The principal kinds of incorporeal hereditaments are, advowsons, tithes, commons, ways, offices, dignities, franchises, and rents. To these Sir W. Blackstone has added two others; corrodies and annuities, which are here omitted.

Origin of
Advowsons.
1 Inst. 17 b.
119 b.
Watson's
Com. In. 64.
edit. 1725.

4. In the early ages of christianity, the nomination of all ecclesiastical benefices belonged to the church. When the piety of some lords induced them to build churches upon their own estates, and to endow them with glebe lands, or to appropriate the tithes of the neighbouring lands to their support; the bishops, from a desire of encouraging such pious undertakings, permitted those lords to appoint whatever person they pleased, to officiate in such churches, and receive the emoluments annexed to them; reserving, however, a power to themselves to judge of the qualifications of those who were thus nominated.

5. This practice, which was originally a mere indulgence, became in process of time a right; and all those who had either founded or endowed a church, claimed and exercised the exclusive privilege of pre-

senting a clerk to the bishop, whenever the church became vacant.

6. An advowson * is therefore a right of presentation to a church, or ecclesiastical benefice. The word is derived from *advocatio*, which signifies, *in clientelam recipere*. For in former times the person to whom this right belonged was called *advocatus ecclesie*; because he was bound to defend and protect, both the rights of the church, and the incumbent clerks, from oppression and violence. Hence the right of presentation acquired the name of advowson, and the person possessed of this right was called the patron of the church.

Description
of.
1 Inst. 17 b

7. Lord Coke says, there may be several patrons, and two several incumbents, in one church: the one of the one moiety thereof, and the other of the other moiety; and one part, as well of the church as of the town, allotted to the one, and the other part thereof to the other. And this is called *advocatio medietatis ecclesie*.

Idem.

8. The right of presentation, and that of nomination to a church, are sometimes confounded; but they are distinct things. Presentation is the offering a clerk to the bishop: nomination is the offering a clerk to the person who has the right of presentation. These rights may exist in different persons, at the same time. Thus, a person seised of an advowson may grant to A. and his heirs, that whenever the church becomes vacant, he will present such person as A. or his heirs shall nominate. This is a good grant; and the person to whom the right of nomination

Right of No-
mination.
Plowd. 529.
Wat. 90.

* The law of advowsons is here only treated of, as far as lay patrons are concerned.

is thus granted is, to most purposes, considered as patron of the church.

9. Where the legal estate in an advowson is vested in trustees, they have the right of presentation in them; but the right of nomination is in the *cestui que trust*. So in the case of a mortgagee of an advowson, the mortgagee has the right of presentation, but the mortgagor has the right of nomination.

Advowsons
appendant.

10. The right of presentation, which was originally allowed to the person who built or endowed a church, became by degrees annexed to the manor in which it was erected; for the endowment was supposed to be parcel of the manor, and held of it; therefore it was natural that the right of presentation should pass with the manors, from whence the advowson was said to be appendant, being so closely annexed to the manor, that it passed as incident thereto, by a grant of the manor. But though an advowson is said to be appendant to a manor, yet, in truth, it is appendant to the demesnes of the manor, which are of perpetual subsistence; and not to the rents and services, which are subject to extinguishment and destruction.

1 Inst. 132 a.
2 Vin. Ab.
594.

Long v.
Hemmings,
1 Leon. 207.

11. It was found, in a special verdict, that the abbot of S. was seised of a capital messuage in F. and of 100 acres of land there; that there was a tenancy holden of such capital messuage by certain services; that the said capital messuage had been known, time out of mind, by the name of the manor of F.; and that the advowson was appendant to it. The Court was of opinion, that here was a sufficient manor, to which an advowson might be well appendant.

1 Roll. Ab.
231. pl. 19.
2 Vin. Ab.
597.

12. It is said, that if a person seised of a manor, to which an advowson is appendant, grants one or two acres of the manor, *una cum advocacione*, the

advowson will become appendant to such one or two acres ; but the land and the advowson must be granted by the same clause.

13. Where the property of an advowson has been once separated from the manor, by any legal conveyance, it is then called an advowson in gross, and never can be appendant again, except in a few cases, which will be mentioned hereafter. In gross.

14. An advowson appendant may become in gross by various means. 1. If the manor to which it is appendant is conveyed away in fee simple, excepting the advowson. Dyer, 103. 2. If the advowson is conveyed away without the manor to which it is appendant. 3. If the proprietor of an advowson appendant presents to it as an advowson in gross. Wats. 69.

15. Where a manor, to which an advowson is appendant, descends to coparceners, who make partition of the manor, with an express exception of the advowson, it ceases to be appendant, and becomes in gross ; but if coparceners make partition of a manor to which an advowson is appendant, without saying any thing of the advowson, it remains in coparcenary ; and yet in every of their turns, it is appendant to that part which they have. 1 Inst. 122 a.

16. An advowson may cease to be appendant for a certain time, and yet become again appendant. Thus, if an advowson is excepted in a lease for life of a manor, it becomes in gross during the continuance of the lease ; but upon its expiration, it again becomes appendant. So, if an advowson appendant is granted to a person for life, it becomes in gross ; if afterwards another person is enfeoffed of the manor to which it is appendant, with the appurtenances, in fee simple, the reversion of the advowson would pass, Wats. 69.

and at the expiration of the grant for life, would again become appendant.

6 Rep. 64 a. 17. If a manor to which an advowson is appendant, descend to two coparceners, and upon a partition the advowson is allotted to one, and the manor to the other, by this means the advowson is become in gross; but if the coparcener, to whom the advowson was allotted, dies without issue, and without disposing of the advowson, it will descend to the other, and again become appendant.

Dyer, 259 a. pl. 19. 18. An advowson may be appendant for one turn, and in gross for another. Thus, if a person, having an advowson appendant, grants every second presentation to a stranger, it will be in gross for the turn of the grantee, and appendant for the turn of the grantor.

Presentative. 19. Advowsons are also presentative, collative, and donative. An advowson presentative is that which has been already described, namely, where the patron has a right of presentation to the bishop or ordinary, and, moreover, to demand of him to institute his clerk, if duly qualified.

Collative. 20. An advowson collative is where the bishop and patron are one and the same person. In which case, as the bishop cannot present to himself, he does, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution.

Donative. 21. An advowson donative is where the king, or any subject by his licence, founds a church or chapel, 1 Inst. 344 a. and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, not to that of the ordinary, and vested absolutely in the clerk, by the patron's deed of donation, without presentation, institution, or induction, Wats. 170.

22. If the patron of an advowson donative once presents to the ordinary, and his clerk is admitted and instituted, the church is by that means become presentative, and shall never after be donative. 1 Inst. 344 b.

23. The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea and abstracted contemplation, it is not capable of corporeal seisin or possession; therefore a presentation to the church is allowed to be equivalent to a corporeal seisin of land. But till the church becomes void, it is impossible to acquire any thing more than a seisin in law of an advowson. How a Seisin is acquired.
1 Inst. 29 a.

24. A person may be tenant in fee simple of an advowson, as well as of a piece of land; in which case, he and his heirs have a perpetual right of presentation. It may also be entailed within the statute *De Donis*, being an hereditament annexed to land; but an estate tail in an advowson, or any other incorporeal hereditament, cannot be discontinued; for nothing passes by the grant of this species of property, except what the owner may lawfully give. What Estate may be had therein.
1 Inst. 322 b.
3 Rep. 85 b.

25. An advowson may be held in joint tenancy, coparcenary, and common. It may also be limited to a person for life or years, in possession, remainder, or reversion.

26. A husband shall be tenant by the curtesy of an advowson, though the church was not void during the coverture. For although, in this instance, the husband had but a seisin in law, yet as he could by no industry attain any other seisin, it shall be sufficient. Subject to Curtesy.
1 Inst. 29 a.

27. This point appears to have been determined in 21 Edw. III. The case is thus stated by Broke.—In a *quare impedit* by the king against divers, the defendant made title that the advowson descended to Ab Tit. Ten. per le Curt. pl. 2.

three coparceners, who made partition to present by turns: that the eldest had her turn; afterwards the second her turn; and he married the youngest, had issue by her, and she died: the church voided; so it belonged to him to present; and did not allege that his wife ever presented, so as she had possession in fact. It was admitted that he might be tenant by the curtesy, by the seisin of the others.

Perk. § 468. 28. Although the church become void during the coverture, and the wife die after the six months past, before any presentment by the husband, so that the ordinary presents for lapse to that avoidance, yet the husband shall present to the next avoidance, as tenant by the curtesy.

1 Inst. 29 a.
n. 5. Mr. Hargrave has observed on this passage, that such a case is not within Lord Coke's reason for allowing curtesy of an advowson, without seisin in deed; and that he did not find any authority to support the doctrine, besides Mr. Perkins's name.

And to
Dower.
Dyer, 35 b.
Wats. 89. 29. Where a widow is endowed of a manor, to which an advowson is appendant, she is entitled to such advowson; and if the church becomes vacant during the continuance of her estate in the manor, she may present to it. So if a widow is endowed of a third part of a manor, to which an advowson is appendant, the third part of the advowson shall pass therewith.

Cro. Ja. 622. 30. A woman is also dowable of an advowson in gross, and the assignment must be of the third presentation.

1 Inst. 379 a. 31. Lord Coke says, if a man, seised of an advowson in fee, marries, his wife, by act in law, acquires a title to the third presentation; then if the husband grants the third presentation to a stranger, and dies, the heir shall present twice; the widow shall have

the third presentation, and the grantee the fourth : for in this case it shall be taken to be the third presentation, which he might lawfully grant.

32. An advowson appendant may be aliened by any kind of conveyance that transfers the manor to which it is appendant. An advowson in gross may also be aliened, but being an incorporeal hereditament, and not lying in manual occupation, it does not pass by livery, but must always have been granted by deed ; and although the law does not consider the exercise of the right of presentation as of any pecuniary value, or a thing for which a price or compensation ought to be accepted, yet the general right to present is considered as valuable, and an object of sale, which may be conveyed for a pecuniary or other good consideration.

May be aliened for ever.

Crispe's Case, Cro. Eliz. 164.

infra, c. 2.

33. An advowson may not only be aliened in fee, for life or years, but the next presentation, or any future number of presentations, may also be granted away.

Or for the next Presentation.

34. It has been stated, that where a married man granted the third presentation to a church, his wife being entitled to such third presentation, as part of her dower, the grantee should have the next presentation after the wife's ; because the wife's title arose from an act of law, which shall not operate to the prejudice of the grantee. But where a man granted the next presentation to A., and before the church became void, he granted the next presentation of the same church to B., the second grant was held void ; for B.'s right of presentation was destroyed by the act of the party, not as in the former case, by an act in law.

ante, § 31.

¹ Inst. 378 b.

35. It has been determined in a modern case, that a grant of the next presentation to a church, does not

become void by the Crown's acquiring a right to present.

Troward v. Cailland,
2 H. Black.
Rep. 324.
6 Term Rep.
439 — 778.

Vide the King
v. Ep. London,
1 Show. R.
441.

Cro. Ja. 691.
Winch. 94.

36. Sir K. Clayton, being seised in fee of an advowson, the church being then full, by a deed poll, granted to M. Kenrick, his executors, &c., the next presentation, donation, and free disposition of the said church, as fully, freely, and entirely as the said Sir K. Clayton or his heirs. The person who was then incumbent was made Bishop of Rochester, whereby the church became vacant, and the King, by reason of his royal prerogative, acquired a right to present a fit person to the said church. It was contended that, in the event that had happened, this grant became void; that in the case of *Woodley v. Episc. Exeter*, it was held, the grantee of the next avoidance must have the next, or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishopric. On the other side it was argued, that the authority of the case of *Woodley v. Episc. Exeter* was expressly contradicted by the note in the margin of *Dyer*, 228 b., which was apparently the same case, where it was stated to have been resolved by the Court, that the grantee should have the next avoidance after the prerogative presentation, because that was the act of the law: and the prerogative of the King, which excluded him from the first presentation, injured no one.

The Court of Common Pleas held, that the grantee of the next presentation should present on the next vacancy, occasioned by the death or resignation of the King's presentee. This judgement was affirmed by the Court of King's Bench; and afterwards by the House of Lords, with the assent of the Judges.

8 Bro. Parl.
Ca. 71.

37. Where a person has only a particular estate in a manor, to which an advowson is appendant, he can of course only alien the advowson for so long as his estate shall continue.

38. A tenant in tail of a manor, to which an advowson was appendant, granted the next avoidance of the advowson, and died; the issue entered on the manor, and the grant was held to be void.

Bowles v. Walter,
1 Roll Ab.
843.

39. Tenant in tail and his son joined in a grant of the next avoidance of a church; the tenant in tail died. It was adjudged that the grant was void against the son and heir that joined in the grant, because he had nothing in the advowson at the time of the grant, neither in possession nor right, nor in actual possibility.

Wyvel's Case,
Hob. 45.

40. If a tenant for life grants the next presentation to a church, such grant is void as to the remainderman.

Dymoke v. Hebart,
1 Bro. Parl.
Ca. 106.

41. It is said by Lord Coke, that an advowson is assets to satisfy a warranty; but that an advowson in gross is not extendible upon a writ of *elegit*; because no annual value can be set upon it. It has however been determined, that an advowson in gross, whether the proprietor has a legal or an equitable interest therein, is assets for the payment of debts; and will be directed, by the Court of Chancery, to be sold for that purpose.

Is Assets for Payment of Debts.
1 Inst. 374 b.
3 P. Wms.
401.
3 Atk. 464.

42. John Tong being indebted to several persons, by judgement, bond, and simple contract, in great sums of money, died intestate; seised in fee, among other things, of the trust of an advowson in gross. Upon a bill filed by the creditors of John Tong, praying a sale of his real estate for the payment of his debts, a question arose whether this advowson was assets; Lord King decreed that it was, and should be sold for the payment of Tong's debts.

Tong v. Robinson,
3 Vin. Ab.
144.
1 Bro. Parl.
Ca. 114.

On an appeal from this decree to the House of Lords, it was insisted by the appellants, that this advowson was not assets at law, or liable to the demands of any of the creditors of Tong; because at law no inheritance was liable to any execution, that was not capable of raising some profits towards satisfaction of the debt, which an advowson was not. On the other side it was contended, that at common law, an advowson in fee was an hereditament descendible to the heir, valuable in itself, and saleable; and even capable, if necessary, of having an annual value put upon it; and was therefore legal assets in the hands of the heir.

The decree was affirmed, with the concurrence of all the Judges.

Westfaling v. Westfaling, 3 Atk. 460. 43. In a case before Lord Hardwicke in 1746, one of the questions was, whether an advowson in gross was assets by descent. His Lordship observed, it had been said the authorities went no farther than where there had been a trust of an advowson, and did not extend to a legal interest; but that this argument was quite cut up by the roots by the determination of the House of Lords in the case of *Tong v. Robinson*. In the minute book of that day, it was taken down that the question proposed to be asked by the Judges was, whether an advowson in fee was assets. It must have been defectively taken by the clerk: the question intended was, whether an advowson in gross in fee was assets; for there could be no doubt as to an advowson appendant to a manor, because the manor itself being assets, what was appendant must be assets likewise; and decreed that it was assets by descent, to satisfy specialty debts.

TITLE XXI.

ADVOWSON.

CHAPTER II.

Of Presentation, Institution, and Induction.

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| 1. <i>Presentation.</i> | 42. <i>Who are disabled from presenting.</i> |
| 6. <i>Institution.</i> | 47. <i>Lunatics.</i> |
| 8. <i>Induction.</i> | 48. <i>Examination of the Clerk.</i> |
| 11. <i>Of Lapse.</i> | 55. <i>Of Simony.</i> |
| 19. <i>Who may present.</i> | 58. <i>Procuring a Presentation for Money.</i> |
| 24. <i>Infants.</i> | 65. <i>Sale of the Presentation during a Vacancy.</i> |
| 27. <i>Joint Tenants.</i> | 72. <i>Sale of the next Presentation good.</i> |
| 29. <i>Coparceners.</i> | 75. <i>Exception.</i> |
| 35. <i>Tenants in Common.</i> | 77. <i>Bonds of Resignation.</i> |
| 36. <i>Effect of a Partition.</i> | |
| 38. <i>Mortgagors may nominate.</i> | |
| 40. <i>And Tenants by Statute Merchant.</i> | |
| 41. <i>And Bankrupts.</i> | |

SECTION 1.

AN advowson consisting in the right of presentation, it will be necessary to examine into the nature of this act, and the consequences that attend it; the time within which it must be done; and the persons who are capable of performing it.

2. Presentation is the offering a clerk by the patron or proprietor of an advowson to the ordinary: this might formerly have been done either by word or by writing; but since the statute of frauds, 29 Cha. II. c. 3. § 4., it is necessary that all presentations be in writing.

Idem.

3. A presentation in writing is a kind of letter, not a deed, from the patron to the bishop of the diocese, in which the living is situated, requesting him to admit the person presented to the church.

Rogers v.
Holloed,
2 Black. R.
1040.
1 Bro. Parl.
Ca. 117.

4. A presentation, though duly made in all respects, may be revoked or varied. This was always held with respect to the king, but was doubted as to lay patrons. It appears, however, to be now fully settled, that a lay patron may revoke his presentation at any time. Sir W. Blackstone has observed, that a presentation was certainly revocable by the principles of the common law, because it vested no right in any one, not even in the clerk presented; for if the clerk had a right, the law would give him a remedy to recover it when invaded. There was, however, no species of common law action open or competent to a clerk, to recover a presentation, when obstructed, but to the patron only. And it was said *arguendo*, in the House of Lords, that a presentation conferred no interest whatever.

1 Inst. 244 a.

5. When the ordinary declares that he approves of the presentee, as a fit person to serve the church to which he is presented; the clerk is said to be admitted.

Institution.

1 Inst. 344 a.

6. Institution is the commitment to the clerk of the cure of souls by the ordinary. The form and manner of it is thus: the clerk kneels before the ordinary, whilst he reads the words of the institution, out of a written instrument drawn for this purpose, with the episcopal seal appendant, which the clerk holds in his hand during the ceremony.

Wats. 156.

7. The act of presentation only gives the clerk a right *ad rem*, but institution gives him a right *in re*: therefore the clerk, when instituted, may enter upon

the glebe, and take the tithes; though he cannot yet sue for them.

8. After institution given, the ordinary issues his mandate for induction, directed to him who has power to induct of common right. This person is generally the archdeacon of the diocese; though by prescription or composition others may induct. Induction,
Wats. 155.

9. The induction is to be made according to the tenor and language of the mandate, by investing the clerk with full possession of all the profits belonging to the church. Accordingly the person who inducts, usually takes the clerk by the hand, and lays it upon the ring of the church door; or if the church is in ruins, then upon the wall of the church or churchyard, and says to this effect:—"By virtue of this mandate I do induct you into the real, actual, and corporeal possession of the church of C. with all the rights, profits, and appurtenances thereunto belonging." After which the inductor opens the door, and puts the clerk into the church, who usually tolls the bell, to make his induction public, and known to the parishioners; after this the inductor endorses a certificate of the induction on the mandate, which is witnessed by the persons present. 1 Burn's Ecc.
Law, 156.

10. It has been stated, that in the case of an advowson donative, neither presentation, institution, or induction are necessary.

11. Presentation must be made within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary; which is called a lapse. It being for the interest of religion that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, Of Lapse,
Wats. c. 12.

avoid paying his ecclesiastical dues ; and thereby frustrate the pious intentions of the founder.

2 Inst. 361. 12. As the computation of time concerns the church, it is therefore made according to the rules of the canon law, that is, by the calendar, for one half year; not counting twenty-eight days to a month: and the day on which the church becomes void is not to be taken in the account.

2 Burgh's Ec.
Law, 327.
2 Roll. Ab.
363.

13. As to the time from which the six months are to commence, the rule of the canon law in all cases was, that the six months should be reckoned, not from the time of the voidance, but from the time when the patron had notice of the voidance. As if the incumbent dies beyond sea, the six months shall not be counted from the time of his death, but from the time of the patron's knowledge thereof.

Idem, 329. 14. It has also been held, that although no lapse shall incur, if no notice be given; yet if in such a case a stranger presents, and his clerk is instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn; because induction is a notorious act, of which he is bound to take notice.

Idem, 328. 15. Where a clerk is refused for want of learning, or on account of his morals, the patron ought to have notice, that he may present another in due time; yet if he neglects to do so, the lapse shall incur from the death or cession of the former incumbent, not from the time of notice.

Idem, 329. 16. If the clerk be not refused, but the bishop only delays the examination of him, whereby the six months pass, no lapse shall incur; because the church remains void by the bishop's own fault; and he is thereby a disturber.

17. After the church has lapsed to the immediate Idem. 115.
 ordinary, if the patron presents before the ordinary
 has filled the church, the ordinary ought to receive
 his clerk. For lapse to the ordinary is only an op-
 portunity of filling a trust, viz. of appointing a proper
 person to supply the living, in the case of the patron's
 neglect; which being performed by the patron him-
 self, the ordinary can then derive no advantage
 from it.

18. In the case of an advowson donative, no lapse Wats. 107.
 incurs by the non-presentation of the patron, within
 six months: the ordinary may however compel the
 patron to present, by means of ecclesiastical censures.

19. With respect to the persons capable of exer- Who may present.
 cising the right of presentation, all those who are sole
 seised in fee, in tail, or for life; or possessed of a term
 for years, of a manor, to which an advowson is appen-
 dant; or of an advowson in gross; may present to
 the church.

20. Where a person is entitled to an advowson in Wats. 140.
 right of his wife, he must present in his own name,
 and that of his wife; and not in his own name only,
 in right of his wife.

21. It has been stated that a man may be tenant c. 1. § 26, &c.
 by the curtesy, and a woman tenant in dower, of an
 advowson; in which case they may present to the
 church, if it becomes vacant during their lives.

22. Where a person is seised of an advowson, and 1 Inst. 388 a.
Wats. 75.
 the church becomes vacant in his lifetime; if he
 dies before he has presented, the right of presenta-
 tion devolves to his executors, because it is considered
 as a chattel real. But if the incumbent of a church Id. 76.
 be also seised in fee of the advowson of the same
 church, and dies, the right to present will devolve to
 his heir, and not to his executor. For the avoidance

and descent to the heir, happening at the same instant, the title of the heir shall be preferred, as the most ancient and worthy.

Smithley v.
Cholmley,
Dyer, 135 a.

23. Where a person has a grant of the next presentation to a church, it is considered as a chattel real, which, if not disposed of, will vest in his executor.

Infants.
1 Inst. 89 a.
3 — 156.

24. Lord Coke says, a guardian in socage of an infant, seised of a manor to which an advowson is appendant, shall not present to the church; because he can take nothing for the presentation, for which he may account to the heir; and therefore the heir shall in that case present, of what age soever he be.

This doctrine is now fully established; and in the following case it was determined that an infant, who was not a year old, might nominate or present to a church.

Arthington v.
Coverley,
2 Ab. Eq.
518.

25. Cyrill Arthington conveyed an advowson to trustees, upon trust to present such son of a particular person, as should be capable of taking the same, when the church became void: and if that person had no son qualified to take the living at that time, then in trust to present such person as the grantor, his heirs or assigns, should appoint, and in default of such nomination by the grantor or his assigns, that the trustees should present a person of their own choosing. The grantor died, leaving his son and heir, an infant of six months old. The living became vacant, and the person named in the deed having then no son capable of taking the living, the guardian of the son took him in his arms, and guided his pen in making his mark; and made him seal a writing, whereby one Hitch was nominated and appointed to the trustees, in order to be presented by them to the living. The

trustees supposing the plaintiff, as an infant, unable to make such an appointment, refused to present Mr. Hitch; upon which the infant brought his bill against the trustees, to have them execute their trust, in presenting his nominee.

It was argued for the defendants that the presentations of clerks to bishops for admission to churches, was an act that required judgement and discretion, which an infant was not master of; and though the law suffered them to present to their own livings, yet it was of necessity, because there was nobody else to do it, and if they could not, then a lapse must incur; for a presentation to a living being a thing of no value, and therefore not to be accounted for, a guardian could not have it: whereas in the present case, if the grantor or his heirs neglected or were incapable of presenting, the trustees were expressly authorized to present, whose act would be considered as the act of the infant; so that no injury would be done to any body. And though, in cases of evident necessity, equity might square itself by law, yet, where no such necessity appeared, reason and common sense ought to prevail: from whence it was inferred, that the nomination, being an act requiring discretion and judgement, was void; and the trustees entitled to present their own clerk.

On the other side it was contended, that in the case of presentation, as an infant just born might present at law, so the law did not look on it as an act which required discretion in the patron; nor indeed was it requisite, for infants being supposed to follow the directions of their guardians, might be informed by them, who was a proper person; or if they were not, yet a presentation being only a bare recommendation of a clerk to the bishop, and not an act which gave

3 Atk. 710. any interest in the living, and the bishop being absolute judge of the person's abilities, there did not appear any great reason why an infant might not make it, as well as a person of full age; and it was not of necessity that they must present; for though a lapse might incur, yet the presentation of the minor, on the next vacancy, was reserved; and nothing divested out of him by the bishop's collation; so that, as to the infant, it was the same whether the bishops collated, or the trustees presented: wherefore they inferred equity ought to be bound to the law, since the case and reason of the thing was alike, for otherwise the greatest confusion and uncertainty would follow.

Lord King said—"An infant of one or two years old may present at law; then why may they not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice; and if this is permitted in law, why should a court of equity act otherwise in equitable estates?" Decree for the plaintiff.

1 Inst. 89 a.
n. 1.

26. Mr. Hargrave has observed, that though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation was obtained from an infant, without the concurrence of the guardian.

Joint Tenants.
Wilson v.
Kirkshaw,
1 Ves. 413.
7 Bro. Parl.
Ca. 296.

27. Where an advowson is held in joint tenancy, all the joint tenants must concur in the presentation. If an advowson is vested in trustees and their heirs, upon trust to present to the church whenever it becomes vacant, they are joint tenants; and there-

fore, upon any avoidance, must all join in the presentation.

28. If there be two joint tenants of an advowson, and one presents without the other, this is no usurpation upon his companion. But if the joint tenant who presented dies, it shall serve for a title in a *quare impedit*, brought by the survivor: if one joint tenant presents, or if they present severally, the ordinary may either admit, or refuse such a presentee; unless they all join; and after the six months, he may present by lapse.

¹ Inst. 186 b.
² — 365.

29. By the common law, where an advowson descends to coparceners, and they cannot agree to present jointly, the eldest sister shall have the first turn, the second the next, and so of the rest, according to their seniority: this privilege extends, not only to their heirs, but to the several assignees of each coparcener, whether they acquire the estate by conveyance, or by act in law, as tenant by the curtesy, who shall have the same privilege by presenting in turn, as his wife would have had, if alive.

Coparceners:
¹ Inst. 166 b.
Plowd. 333.

² Inst. 365.

30. The estate of an advowson descended to two daughters as coparceners: the church became vacant twice in their time, and both joined in presentation: the eldest married, settled her estate in the common way, and died. A vacancy happening, the husband of the eldest, entitled to her estate as tenant by the curtesy, or under the settlement, claimed to present. The question was, whether the alternate turn of presentation among coparceners continued to the grantee; that is, whether the persons to whom it was conveyed were to be considered as enjoying the same privileges of presenting in turn, as the sisters and parceners, if they had their own estate.

Buller v.
Episc. Ex-
eter, 1 Ves.
340.

Mr. Baron Clarke was clearly of opinion, upon the authority of the passage in 2 Inst. 365., that the husband of the eldest sister was entitled to the presentation.

Willes Rep.
663.

31. By the statute Westm. 2. c. 5. it is provided, that where an advowson descends to coparceners, though one presents twice, and thereby usurps upon his coheir, yet he that was negligent, shall not be barred, but another time shall have his turn to present when it falleth.

2 Inst. 365.
2 Roll. Ab.
346.

32. Lord Coke, in his comment on this statute, says,—If a stranger usurps in the turn of any of them, this does not put her sister out of possession, in respect of the privity of estate, no more than if one coparcener takes the whole profits.

Bro. Ab. Tit.
Quare Imp.
pl. 118.

33. There were four coparceners of an advowson. The first daughter presented to the first avoidance; the second daughter to the second; on a third avoidance, a stranger usurped on the third daughter, and presented; the presentee was instituted and inducted and died. The fourth shall not lose her turn by the third daughter's suffering a stranger to present by usurpation, but shall present to that avoidance.

Vide Barker
v. Lomax,
Willes R.
659.
1 Hen. Black.
412.

2 Inst. 365.

34. Although coparceners make composition to present by turns, this being no more than the law doth appoint, *expressio eorum quæ tacitè insunt, nihil operatur*: therefore they remain coparceners of the advowson; the inheritance of which is not divided.

Tenants in
Common.

35. Tenants in common of an advowson must all join in presenting to the church. If they present severally, the ordinary may either admit or refuse the clerk; and after six months, he may present by lapse. But if one tenant in common presents alone, this will not put the other out of possession.

2 Roll. Ab.
372.

36. It is laid down by Lord Holt, that joint tenants of an advowson may make partition to present by turns ; which will divide the inheritance *aliquatenus*, and create separate rights. So that the one shall present in the one turn, and the other in the other ; which is a sufficient partition. For partition of the profits, is a partition of the thing, where the thing and the profits is the same. It cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. And in this case each of the parties is said to have *advocationem medietatis ecclesie*.

Effect of a Partition.
Ep. Sarum v. Philips,
1 Ld. Raym. 535.

1 Inst. 18 a.

37. By the statute 7 Ann. c. 18. § 2. it is enacted, " That if coparceners, or joint tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them, to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn ; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn : in like manner, if there be three, four, or more ; every one shall be said to be seised of his or her part, and to present in his or her turn."

38. Where a person mortgages an advowson, the legal right to present is transferred to the mortgagee ; yet he cannot present a clerk of his own choice ; whether the advowson be appendant or in gross. For since the presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a court of equity will compel him to present the nominee of the mortgagor.

Mortgagors may nominate.
Amhurst v. Dowling,
2 Vern, 401.
Gully v. Selby,
Com. R. 343.

Mackenzie v.
Robinson,
3 Atk. 559.

39. A petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson might accept of his nominee, and present him upon an avoidance, the incumbent being dead. It was insisted for the mortgagee, that as there was a large arrear of interest, he ought to present, if any advantage accrued from it; and the case in *Peer Williams* was cited, where the plaintiff's father, being possessed of a 99 years term of the advowson of Eckington, made a mortgage thereof to the defendant, and in the mortgage deed was a covenant, that on every avoidance of the church, the mortgagee should present; in which the Court gave no opinion; but seemed to incline, that the mortgagee had a right to present.

Gardiner v.
Griffith,
2 P. Wms.
404.

Lord Hardwicke was of opinion that the mortgagor ought to nominate; and that it was not presumed any pecuniary advantage was made of a presentation. He observed that these were indifferent securities, but the mortgagee should have considered it before he lent his money; and, instead of bringing a bill of foreclosure, as he had done in this case, should have prayed a sale of the advowson. The next day he mentioned that he was not clear as to this point, and that he had looked into the case of *Gardiner v. Griffiths*, according to the state of it in the House of Lords, where the decree of Lord King was affirmed, and said that was a mixed case; and that he doubted himself whether a covenant, that the mortgagee should present, as was the case there, was not void; being a stipulation for something more than the principal and interest; and the mortgagee could not account for the presentation.

The question was adjourned for farther consideration to the next day of petitions, when the mortgagee

not being able to find any precedent in his favour, gave up the point of presenting; and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee.

40. It was formerly understood that where a manor, to which an advowson was appendant, was extended on a statute merchant; if the church became void during the cognizee's estate, he might present to it. But it is to be presumed, that if a case of this kind were now to arise, the cognizor of the statute would be allowed to nominate a clerk to the cognizee; by analogy to the case of a mortgage.

And Tenants
by Statute
Merchant.
Arundell v.
Ep. Gloucester,
Ow. 49.

41. It has been held, that if a patron of a church is a bankrupt, and the church becomes void before the advowson is sold under the commission, the bankrupt shall present, or nominate, to the church.

And Bank-
rupts.
Wats. 106.

42. With respect to the persons who are disabled from presenting to a church, none but natural-born subjects can exercise this right. And therefore if an alien purchases an advowson, and the church becomes vacant, the king shall have the presentation.

Who are dis-
abled from
presenting.
Wats. 106.

43. Where a person seised of an advowson is outlawed, and the church becomes vacant while the outlawry is in force, such person is disabled from presenting, and the avoidance is forfeited to the crown.

44. By the statute 1 Will. & Mary, sess. 1. c. 26. every person who shall refuse or neglect to subscribe the declaration mentioned in an act of that parliament, intituled "An Act for the better securing the Government, by disarming Papists;" shall be disabled to make any presentation to a benefice. And the

chancellor and scholars of the universities of Oxford and Cambridge shall have such presentation. *

45. By the third section of this statute, the trustees of Roman Catholics are disabled from presenting to any benefice. And by the fourth section, such trustees, by presenting without giving notice of the avoidance to the vice-chancellor of the university, to whom the presentation shall belong, within three months after the avoidance, become liable to a penalty of 500 l.

46. By the statute 12 Ann. st. 2. c. 14. § 1. Roman Catholics are disabled from presenting to any benefice ; and every such presentation is declared void to all intents and purposes. By the stat. 11 Geo. 2. c. 17. § 5. every grant made of any advowson or right of presentation, collation, nomination, or donation to any benefice, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, shall be null and void ; unless it be for valuable consideration to a Protestant purchaser.

Lunatics.

47. A lunatic cannot present to a church, nor his committee. For where a lunatic is seised of an advowson, the Lord Chancellor, by virtue of the general authority delegated to him, presents to the living, whatever the value of it be ; generally, however, giving it to one of the family. This right, says Dr. Wooddeson, was first asserted by Lord Talbot ; whose example has been followed by all his successors.

Lect. vol. 1.
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* The presentation to the livings situated south of the Trent, belong to Oxford ; and those situated north of that river, belong to Cambridge.

48. The right of presentation is but a limited trust, Examination of the Clerk.
for the bishops are still in law the judges of the qualifications of those who are presented to them. Patrons never had the absolute disposal of their churches, upon their own terms; but if they did not present fit persons, within the limited time, the care of appointing a proper person to fill up the vacant benefice, returned to the bishop.

49. The law requires that the person presented be 2 Inst. 631.
idonea persona: various exceptions may therefore be made to the character and qualifications of the person presented; 1st, Concerning his person, if he be under age, or a layman; 2dly, Concerning his conversation, if it be irregular or criminal; 3dly, Concerning his ability and sufficiency to discharge his pastoral duty, which belongs to the bishop, as the proper ecclesiastical judge; who may and ought to refuse the person presented, if he be not *idonea persona*.

50. It is a good cause of refusal of a clerk, that he 2 Roll. Ab. 356.
is *simoniacus* in the same presentment; that is, has made a corrupt contract to be presented; or that he is *simoniacus* in another benefice.

51. It was resolved by the Court of King's Bench Specot's Case, 5 Rep. 57.
in 32 Eliz. that all such as are sufficient causes to deprive an incumbent, are sufficient to refuse a presentee.

52. When the bishop refuses without good cause, Wals. 230.
or unduly delays to admit and institute a clerk to the church, to which he is presented, the clerk may have his remedy against the bishop in the ecclesiastical court.

53. If the patron finds himself aggrieved by the 2 Inst. 631.
ordinary's refusal of his clerk, he may have his remedy by writ of *quare impedit*, in the temporal court; and in such case the ordinary must show the cause of his

refusal, specially and directly; not only that he is a schismatic or a heretic, but also the particular schismatical or heretical opinions, with which he is charged, must be set forth; for the examination of the bishop does not finally conclude the plaintiff; and without showing specially, the Court cannot inquire and resolve whether the refusal be just or not. If the cause of refusal be spiritual, the Court shall write to the metropolitan to certify thereof; or if the cause be temporal, and sufficient in law, which the temporal court shall decide, the same may be traversed, and an issue thereupon joined, and tried by a jury.

Ep. Exeter,
v. Hele,
Show. Parl.
Ca. 88.

54. It has been determined by the House of Lords, that it was a good plea on the part of a bishop, in a *quare impedit*, that the presentee was a person not sufficient or capable in learning to have the church; and that he need not set forth in what kind of learning, or to what degree, he was defective.

Of Simony.

55. As it is of the utmost importance to the public that ecclesiastical offices should be conferred on those only whose learning and piety qualify them for the duties annexed to such offices; the law has always been extremely careful in watching over those who have advowsons, least they should be influenced, in the exercise of the right of presentation, by any corrupt or improper motives. It has therefore been established from the earliest times, that no pecuniary or other valuable consideration ought, in any instance, to be given or received, for procuring a presentation to a church. This offence is called simony in the canon law; the person making a corrupt contract of this kind is called *simoniacus*; and a person thus presented to a church is said to be *simoniacè promotus*.

1 Inst. 17 b.
89 a.
3 Inst. 153.

56. By the statute 31 Eliz. c. 6. it is enacted, for avoiding of simony, that if any patron, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void; the presentee be rendered incapable of ever enjoying the same benefice; and the Crown shall present to it for that time only.

57. It was formerly held, that if a person who had Wats. 96. acquired a benefice by simony, enjoyed it during his life, the king might present after his death, because the church, notwithstanding the institution and induction of the simonist, remained void to the king's presentation, before his death; and his death could not make him incumbent, that was none before, or otherwise alter the case. But now, by the statute 1 Will. & Mary, c. 16., it is enacted, that if a person simoniacally presented, shall die without being convicted of such simony, in his lifetime, such simoniacal contract shall not prejudice any innocent patron or clerk, on pretence of lapse to the crown, or otherwise.

58. The first kind of simony under the statute 31 Eliz. is, where any sum of money, gift, reward, profit, or benefit is given or promised, directly or indirectly, for procuring a presentation to a benefice. Procuring a Presentation for Money. And Lord Coke says, simony is more odious, because 3 Inst. 156. it is ever accompanied with perjury: for the presentee is sworn not to commit simony.

59. If a clerk seeks to obtain for money a presentation to a void church, though afterwards the patron presents him *gratis*, yet this simoniacal attempt disables him from taking the benefice; being deemed Wats. 43.

an unfit person to hold it, for having at any time been capable of intending to obtain it corruptly.

Idem, 37.

60. If a patron promises a clerk that, in consideration of his marrying his daughter or kinswoman, he will present him to a living when void, this is a simoniacal contract.

Byrte v. Manning,
Cro. Car. 191.

61. But where A. covenanted that B. his son should marry C. the daughter of D., in consideration of which D. covenanted to advance 300*l.* for his daughter's portion; and A. covenanted to settle certain lands on his son and his intended wife. There were likewise covenants on the part of A. for the value of the lands, and for quiet enjoyment; and a covenant on the part of D. to procure a certain benefice for B. on the next avoidance. It was held that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independent covenant, without any apparent consideration.

Baker v. Mounford,
Noy, 142.

62. A reservation of a profit to a stranger, as an annuity to the widow or son of the last incumbent, does not appear to be within the statute 31 Eliz., though Doctor Watson doubts it; but it is perfectly clear that a reservation of any kind of profit, in favour of the patron, is within the statute.

Hutchinson's Case,
12 Rep. 101.
Id. 74.
3 Inst. 154.
Cro. Eliz.
789.

63. It was resolved by all the Judges, in 8 Jac. I., that if any should receive or take money, fee, reward, or other profit, for any presentation to a benefice with cure, although in truth he which is presented be not knowing of it, yet the presentation, admission, and induction, are void, by the express words of the statute 31 Eliz., and the king shall have the presentation *hac vice*. For the statute intends to inflict punishment upon the patron, as upon the author of this corruption, by the loss of his presenta-

tion; and upon the incumbent who came in by such a corrupt patron, by the loss of his incumbency, although that he never knew of it. But if the presentee be not cognizant of the corruption, then he shall not be within the clause of disability in the same statute.

64. In a writ of error to reverse a judgement, whereby the king had recovered upon a title of simony, which was, that a friend of the clerk had agreed to give a sum of money to J. S., who was not the patron, to procure the clerk to be presented to a church, who was presented accordingly.

Rex v. Trussel,
1 Sid. 329.
2 Keb. 204.

It was assigned for error, that it did not appear that either patron or clerk were acquainted with the agreement. But the Court said, the clerk was *simoniacè promotus*. And it was said that Doctor Duxon had enjoyed the church of St. Clements above twenty years by such a title of the king's; the presentee of the patron being ousted, by reason of a friend's having given money to a page of the Earl of Exeter, to endeavour to procure the presentation; and neither the earl nor the clerk knew any thing of it.

65. The second kind of simony is, where the right of presenting is sold at the time when the church is vacant. This was also held to be void at common law; because, during the vacancy of the church, the right of presenting was but a *chose in action*, which could not be transferred.

Sale of the Presentation during a Vacancy.

66. A patron of an advowson, the church being void, granted to B. *proximam presentationem* to the said church, *jam vacantem, ita quod liceat B. hac vice ad dictam ecclesiam presentare*.

Stephens v. Wall,
Dyer, 282 b.
Jenk. Cent. 6.
Case 13.

Resolved, by all the Judges of England, that the grant was void, for the present avoidance was a thing

in action and privity, and vested in the person of the grantor.

Benloe, 192.

Amb. 268.

67. A lease of an advowson, granted after the church became vacant, was adjudged void, as to the immediate presentation. And it is said by Lord Hardwicke, that the sale of an advowson during a vacancy was not within the statute of simony, as a sale of the next presentation was, but was void by the common law.

Ep. Lincoln
v. Wolfors-
tan, 1 Black.
R. 490.
2 Wils. R.
174.
3 Burr. R.
1512.

68. In a modern case, the Court of King's Bench was clear that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant, *quoad* the fallen vacancy. Lord Mansfield and Mr. Justice Wilmot said, the true reason why a grant of a fallen presentation of an advowson, after avoidance, is not good, *quoad* the fallen vacancy, is the public utility; and the better to guard against simony: not for the fictitious reason of its being a *chose in action*.

69. It was held in the same case, that a grant of a presentation, after institution of the incumbent to a second living, which vacated the first, was void; because the church was considered as vacant from the time of institution.

Leak v. Ep.
Coventry,
Cro. Eliz.
811.

70. If the patron sells the fee simple of the advowson after the avoidance, neither he nor his vendee can have a *quare impedit*; because the avoidance makes it a *chose in action*, so that it does not pass to the grantee; and the grantor has destroyed his action by his conveyance; so none can have it.

Walker v.
Hammersley,
Skin. 90.

71. If a presentation be made by a person usurping the right of patronage, and pending an action for removing his clerk, who is afterwards removed, the benefice is sold; this is an offence within the mean-

ing of the statute, for the church was never full of that clerk. And if this were allowed, the statute might be eluded; for it would be only getting an usurper to present, while the church was void, and then selling it.

72. Where a person purchased the next presentation to a benefice, the church being then full, with an intention to present a particular person, a subsequent presentation of that person was formerly deemed simony; but it is now an universal practice to purchase the next presentation to a living, the church being full; and there is no modern instance where presentation under such circumstances has been questioned.

Sale of the next Presentation good.

73. It has been several times laid down, that a purchase of the next presentation to a church, when the incumbent is in a dying state, is simony; but it was determined, in the following case, that a purchase of an advowson in fee simple, under these circumstances, was not simony.

Cro. Eliz. 685.
Hob. 165.
19 Vin. Ab. 458.

74. The plaintiff, Barrett, having notice that the incumbent of a living was on his death-bed, and that it was uncertain whether he would live over the night, purchased the advowson in fee of the defendant. The incumbent died the next day, and the purchaser presented his clerk upon that avoidance. A question was referred by the Court of Chancery to the Court of Common Pleas, whether the said presentation was void, as being on a simoniacal contract.

Barrett v. Glubb, 2 Black. R. 1052.

Serjeant Hill argued for the plaintiff, that this was to simony, being the sale of an advowson in fee, before an actual vacancy; that simony was properly defined a presentation in respect of reward; that the statutes of simony being penal, and restrictive of the common law, ought therefore to be construed strictly;

that fraud or simony ought not to be presumed or intended.

Serjeant Glyn, for the defendants, insisted that the common law, previous to any statute, took notice of corrupt presentations, as contracts *ex turpi causa*; that no profit was allowed to be made of a right of patronage; that a purchase made with an intent to present a particular person, was simoniacal; and the laws against simony, when they merely vacated the presentation, were considered as remedial, and construed largely; when they inflicted a forfeiture, as penal, and construed strictly.

Lord Chief Justice De Grey said, he was not able to doubt upon the question. An advowson was a temporal right, not indeed *jus habendi*, but *jus disponendi*. The exercise of that right was by presentation. The right itself was a valuable right, therefore an advowson was held to be assets in case of lineal warranty. It was real assets in the hands of the heir; and the trustee or mortgagee of an advowson was bound to present the clerk of the *cestui que trust*, or mortgagor. Thus far it was a valuable right, and properly the object of sale; but the exercise of this right was a public trust, therefore ought to be void of any pecuniary consideration, either in the patron or the presentee. It could not, it ought not, to produce any profit. It was not vested in a guardian in socage, nor was he accountable for any presentation made during the infancy of his ward.

Simony was unknown to the common law, though corrupt presentation was. But what was or was not simony depended on the statute 31 Eliz., which did not adopt all the wild notions of the canon law, but had defined it to be a corrupt agreement to present. No conveyance of an advowson could be affected by

that act, unless so far as it affected the immediate presentation; therefore a sale of an advowson, the church being actually void, was simoniacal and void in respect to the then present vacancy. . But it had never been thought, that to purchase an advowson merely with the prospect, however probable, that the church would soon become void, was either corrupt or simoniacal; though, by the common law, if a clerk, or a stranger, with the privity of the clerk, contracted for the next avoidance, the incumbent being *in extremis*, it was held to be simoniacal.

The present case was the purchase of an advowson in fee. No privity of the clerk appeared. The church was not actually void, but in great probability of a vacancy; which, however, was by no means equivalent to a certainty. He said the Judges would go beyond every resolution of their predecessors, to determine this to be simony. Suppose this had been the purchase of a manor, with the advowson appendant, and the incumbent lying *in extremis*, what must be done in the present case was simony. Must the Court have declared the appendancy to be severed, or that the whole manor was purchased corruptly, for the sake of the advowson?

The other Judges concurred, and the Court certified that the presentation was not void, it not appearing to them to have been made upon a simoniacal contract.

75. It was formerly doubted whether it was simony Exception. for a clerk to purchase for himself the next presentation to a benefice, while it was full, and to be presented thereto, when it became void. To put an end to this doubt, the statute 12 Ann. c. 12. enacts, "That if any person shall, for money, reward, gift, profit, or advantage, or for or by reason of any pro-

mise, agreement, grant, bond, or other assurance, of or for any money, reward, gift, profit, or benefit, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance or presentation to any benefice, &c., and shall be presented or collated thereupon, that every such presentation or collation shall be utterly void and of no effect in law; and such agreement shall be deemed to be a simoniacal contract, and it shall be lawful for the queen's majesty, her heirs and successors, to present or collate unto such benefice, &c. for that time or turn only. And the person so corruptly taking, procuring, or accepting such benefice, &c. shall, from thenceforth, be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain, or penalty prescribed or inflicted by the laws ecclesiastical, in like manner as if such agreement had been made after such benefice, &c. had become vacant."

76. It has been doubted whether the purchase of an advowson in fee by a clergyman, and a presentation of himself upon the death of the incumbent, be within this statute. It appears, from an opinion of the late Mr. Fearne, that he did not consider such a purchase as prohibited by that statute; and that a presentation by a trustee of such a purchaser, of the purchaser himself, might be made. This opinion is supported by Lord Chief Justice De Grey's argument in the case of *Barrett v. Glubb*, in which he distinguished between a purchase of the next presentation to a church, and a purchase of an advowson in fee; for, in the first case, he admitted that a purchase would be simoniacal, if the incumbent was *in extremis*; whereas in the second case he held it good.

Cases and
Opinions,
409.

ante, § 74.

Vide Paley's
Philosophy,
B. III. c. 20.

77. It has long been a common practice for patrons, when they present a clerk to a living, to take a bond from him in a sum of money, conditioned either to resign the living in favour of a particular person, as a son, relation, or friend of the patron, whenever such son, &c. becomes capable of taking the living, or else to resign generally, upon the request of the patron. In the first case they are called special bonds of resignation, and have always been held valid. In the second case they are called general bonds of resignation; and were never approved of by the bishops, though held to be valid by the courts of law and equity. But whenever they were used for the purpose of obtaining any pecuniary advantage from the person presented, the Court of Chancery always interposed and granted an injunction against them.

Bonds of Resignation.

Johns v. Lawrence,
Cro. Ja. 248.

Babington v. Wood,
Cro. Car. 180.

Hilliard v. Stapleton,
1 Ab. Eq. 86.

Compl.
Incumb. 39.

78. Dr. Watson observes, that general bonds of resignation did not find any encouragement from the Court of Chancery, which relieved the incumbent; and would not oblige him to resign, or to pay the penalty of the bond, unless some special cause were shown and made out by the patron, that he was unqualified to hold the living, or guilty of some immorality or irregularity, which was a sufficient cause of deprivation; or at least that he was non-resident, and neglected his duty. But in the following case it was determined by the House of Lords, that where a clerk, upon being presented to a living, entered into a general bond to the patron, to resign whenever the patron should require him, such bond was absolutely void.

79. The rectory of the parish church of Woodham Walton, in the diocese of London, becoming vacant, Mr. Fytche, the patron, presented his clerk, the Rev. Mr. Eyre, to the bishop, for institution. The bishop

Ep. London v. Fytche,
2 Bro. Parl. Ca. 211.

being informed that Mr. Eyre had given his patron a bond in a large penalty, to resign the said rectory at any time upon his request, and Mr. Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living. Mr. Fytche brought a *quare impedit* against the bishop, to which he pleaded two pleas :—1. That the living was a benefice with cure of souls, and that the clerk had given a bond to the patron in the penalty of 3,000*l.* to resign at any time upon the request of the patron ; whereby the presentation became void in law. 2dly, That the living was a benefice with cure of souls, and that, for the purpose of investing the patron with an undue influence over the clerk, it was agreed that the clerk should, in consideration of the presentation, become bound to the patron in a bond as aforesaid ; which was accordingly done.

Mr. Fytche demurred to both these pleas. The bishop having joined in demurrer, judgement was given by the Court of Common Pleas for the patron, and affirmed by the Court of King's Bench.

Upon a writ of error in the House of Lords, it was contended on the part of the bishop, that although there were several adjudged cases upon the subject of general bonds of resignation, none of them had arisen in the same form, or between parties acting in the same capacity, and under circumstances similar to the present ; therefore they ought not to be considered as precedents by which this case was to be determined. That the bishop or ordinary was authorized by law to judge in the first instance of the fitness or unfitness of the person presented to him for institution ; and the appellant had, in this instance, exercised his authority according to law. That it was in the power of the patron, by means of a general

bond, to establish two modes of selling a vacant living, which was simony ; either of which was equally certain and infallible. 1. The parties might make the penalty in the bond adequate to the price of the living. The presentee, when instituted, might refuse to resign, and pay the penalty without any suit ; or might make known the execution of the bond, and then tender resignation to the bishop ; which the bishop, under those circumstances, would probably refuse. Upon his refusal, the bond might be put in suit ; and thus, also, by a circuit, the penalty might be paid as the price of the living.

The second mode of selling a living which was vacant, through the medium of a general bond of resignation, was equally obvious and practicable. The penalty of the bond of resignation might be made excessive, much above the real value of the living ; the patron might during the incumbency of the presentee, who executed the bond to resign, sell the next turn or right of presentation, at an advanced price, and after such sale require the incumbent to resign in terms of his bond. By this means the first presentation would be fictitious ; and the sale of the second presentation, though made under the pretence of selling a right of presentation to a full benefice, would in reality be the sale of a vacant living. That a general bond to resign put the person who entered into such bond under the power of the lay patron, instead of being under the authority of the bishop, to whom he swears canonical obedience ; and whom by law he was obliged to obey ; and was thus contrary to good policy ; creating an influence which tended to subvert ecclesiastical discipline and subordination. That general bonds of resignation were contrary to law, by altering the tenure of the office

of a beneficed clergyman; for every benefice being an office for life, the patron could grant it only for life; he could not grant it for years, he could not grant it at the will of himself, for such grant in direct terms would be void, as contrary to the very tenure of the office: where there was a general bond of resignation entered into, the same alteration of the tenure was effected by circuitry. The patron granted, and the presentee accepted, at the will of the patron, that benefice, which the law intended to be conferred and holden for life.

That although a court of equity would grant relief in case the patron made an improper use of a general bond to resign; yet from the extreme difficulty of discovering the real purpose for which it was used, it could seldom be possible to procure such relief; or to guard, by that means, against the consequences that follow from such bonds being tolerated. The bad purpose not being discovered, could not be prevented but by a solemn decision, that general bonds of resignation were illegal. That a general bond of resignation puts it in a great measure in the patron's power to convert a part of the profits of the living to his own use; and absolutely puts it in the power of patron and incumbent together, to make such partition of them as they can agree upon, whereby the revenues of the church may be alienated: and that a general bond of resignation was an assurance of profit or benefit to the patron; and therefore contrary to the statute 31 Eliz. c. 6, and inconsistent with the oath of simony.

On behalf of the defendant in error, it was said that this was a new attempt to question the settled law of the land; namely, whether a bond given by the presentee to the patron, with a condition to

resign upon request, which was termed a general resignation bond, simple and unattended with any other fact or circumstance, was corrupt, simoniacal, and against the statute of Elizabeth. This had been questioned and repeatedly determined in Westminster Hall to be legal, and not simoniacal; and it was looked upon to be so well settled and established, that in *Hesketh v. Gray*, 28 Geo. II. the Court would not suffer the counsel to argue against the validity of such a bond. But such a bond might be abused; it might be corrupt, simoniacal, and against the statute; it might be given upon a preceding stipulation of gain, &c. or after it was innocently given, it might be used by the obligee for the purpose of withholding tithes, or deriving some pecuniary advantage to himself. And if there were only grounds to suspect such practices, a bill might be filed for a discovery; and it was admitted that when such illegal facts were alleged and proved, such a bond could not be enforced in a court of justice. But the courts of justice never interfered with possibilities. They never interfered but when such abuse appeared, and was specified and alleged in the pleadings, in order to be proved if denied. That the bishop in this case was precisely in the same predicament with the clerk in all the other cases. He had the same advantage of filing a bill for a discovery of such illegal fact, and of pleading it, when he had so discovered it; and he had it in the present case.

But the bond in the present case was a mere simple resignation bond, unattended with any such illegal circumstance; every such circumstance, suggested by a bill for a discovery, had been denied; no such abuse was specified in the first plea; and therefore

the cause therein alleged by the bishop, was not sufficient for him to refuse the clerk. That the same reasoning might be applied to the second plea,—the possible abuse of such a bond; viz. that he would have acquired, and had undue influence, power, and control over the clerk, if he had admitted him; so also as to the unfitness of the clerk. But in order for the courts to interfere, the undue influence must have happened: it must then be specified and alleged in the plea, in order for the court of justice to interfere: the unfitness in like manner must be specified and alleged, in order to be proved. But the bond in the present case was unattended with any such circumstance; and therefore neither any undue influence or unfitness was specified in the second plea to have attended the presentation; consequently the cause here alleged was not sufficient for the bishop to refuse the clerk.

As to the propriety of specifying the unfitness, it might be observed, that the judgement of the bishop was subject to review; he could not refuse *ad libitum*, he must assign his cause of refusal; for every fact of unfitness might be questioned, and tried in a temporal court, except literature; and that was subject to the review of the metropolitan. Upon the whole, there was no fact alleged in the pleadings of illegal use in giving the bond; or of undue influence or unfitness in the clerk to be admitted, &c., besides the mere naked giving of the bond: wherefore it was hoped the judgement of the Court of King's Bench would be affirmed.

After hearing counsel on this case, several questions were put to the Judges; seven of whom were of opinion that the bond was good and valid; and the eighth,

(Mr. Baron Eyre) that it was illegal. A debate and division of the house ensued, when there appearing to be for reversing the judgement nineteen, among whom were all the bishops present, and against it eighteen; it was ordered that the judgement given in the Court of King's Bench, affirming a judgement given in the Court of Common Pleas, should be reversed. 30 May 1783.

80. In consequence of this determination, general bonds of resignation must now be deemed illegal and void. But the courts of law do not seem disposed to condemn bonds of resignation, unless they are exactly similar to that which was held unlawful in the above case: for in a subsequent case the Court of King's Bench held, that a bond by which a clerk shall only bind himself to the performance of those duties which the rules of law, and the principles of morality require, is valid, and will be enforced.

81. A bond was given by a clerk to a patron, to reside on the living, or to resign if he did not return after notice; and also not to commit waste on the parsonage. *Bagshaw v. Bopley, 4 Term R. 78.*

In an action of debt on this bond, the question was, whether it was valid or not.

Lord Kenyon.—“I cannot bring myself to entertain a doubt on this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now

this bond was entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the bishop of London v. Fytche; when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say, it cannot be governed by that. For here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties, which in morality, religion, and law, he ought to do. I am therefore clearly of opinion that a bond for the performance of those duties is not illegal."

Mr. Justice Buller.—" I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more: it only requires him to do what the law would have compelled him to do without it."

Mr. Justice Grose was of the same opinion, and judgement was given for the plaintiff.

Partridge v.
Whiston,
4 Term R.
359.

22. In a subsequent case, where a clerk had given a bond to the patron on his presentation, on condition to reside on the living; and to resign, if the patron's son became capable and desirous of taking the living; and also to keep the rectory house and chancel in repair: the Court of King's Bench, in an action of debt on this bond; understanding that it was intended to carry the case up to the House of Lords, gave judgement for the plaintiff, without any argument; saying, that as this was not precisely

similar to the case of the bishop of London v. Fytche, they were bound by the established series of precedents.

It does not appear that this case was ever carried to the House of Lords.

How did now y^e case 14

TITLE XXII.

TITHES.

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| <ul style="list-style-type: none"> 1. <i>Origin and Nature of.</i> 5. <i>Different Kinds.</i> 12. <i>How and when due,</i> 16. <i>Of what Things predial Tithes are due.</i> 17. <i>Corn and other Grain.</i> 21. <i>Hay.</i> 25. <i>Underwood.</i> 36. <i>Hemp, Flax, &c.</i> 37. <i>Hops and Turnips.</i> 39. <i>Agistment.</i> 45. <i>Gardens.</i> 48. <i>Of what Things mixed Tithes are due.</i> 51. <i>Of what Things personal Tithes are due.</i> 53. <i>What Things are not titheable.</i> 58. <i>To whom Tithes are payable.</i> | <ul style="list-style-type: none"> 59. <i>Rectors or Parsons.</i> 60. <i>Portionists.</i> 61. <i>Vicars.</i> 66. <i>The King.</i> 67. <i>Lords of Manors.</i> 68. <i>Lay Impropriators.</i> 73. <i>What Estate they may have.</i> 78. <i>Of Exemptions from Tithes.</i> 79. <i>Real Composition.</i> 83. <i>Prescription De modo decimandi.</i> 86. <i>Prescription De non decimando.</i> 94. <i>Act of Parliament.</i> 95. <i>Nonpayment of Tithes cannot be pleaded against a Layman.</i> 101. <i>Long Possession of a Portion of Tithes creates a Title.</i> |
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SECTION 1.

Origin and
Nature of.

DURING the first ages of christianity, the clergy were supported by the voluntary offerings of their flocks ; but this being a precarious subsistence, the ecclesiastics in every country in Europe, in imitation of the Jewish law, claimed, and in course of time established, a right to the tenth of all the produce of lands. This right appears to have been fully admitted in England before the Norman conquest, and acquired the name of tithe, from a Saxon word signifying tenth.

2. Tithes may be described to be a right to the tenth part of the produce of lands, the stock upon the lands,

and the personal industry of the inhabitants. * They were originally a mere ecclesiastical revenue ; ecclesiastical persons only having a capacity to take them ; and ecclesiastical courts only having cognizance of them. They were not considered as any secular duty, or as issuing out of land, but in respect of the persons of the laity ; in return for the benefit they derived from the ministry of their spiritual pastors.

3. Tithes in their essence have nothing substantial or permanent ; they consist merely in *jure*, and are only a right. An estate in tithes is no more than a title to a share or portion of the produce of lands, after it shall have been separated from the general mass. Before severance it is wholly uncertain what the amount of that share or portion may be. Nay, its very existence is precarious ; this, like its quality, depending upon the accidents of climate, season, soil, cultivation ; and the will and caprice of the several owners and possessors of the land. If the ground be not sown, if the farm be not stocked, if the fruits be not gathered, no tithe can possibly arise. For tithe is payable, not in respect of the land, but of the person. It is not an estate in the land, but a right to a determinate portion of its fruits. Therefore a release of all demands in lands does not operate as a discharge of tithes ; for as they would not pass under the denomination of land, neither would they be affected by a release of all claims arising out of lands.

Bac. Ab. Tit.
Tithes.

Cro. Eliz.
216.
1 Leon. 300.
1 Rep. 111 a.
2 — 49 a.

4. Tithes then are not an object of the senses, they are neither visible nor tangible ; their produce

* Nothing more than a general outline of the law respecting tithes is here attempted, and that only as far as relates to Lay Impropiators.

indeed may be seen and felt, but they exist only in contemplation of law. It follows that they are incorporeal, for the law ascribes corporiety only to those objects which are substantial and permanent.

Different
Kinds.

5. Tithes are of three kinds, predial, mixed, and personal. Predial tithes are such as arise merely and immediately from the vegetable produce of the land; because a piece of land or ground being called in the canon law *prædium*, whether it be arable, meadow, or pasture, the fruit or produce thereof is called predial. Nor is any allowance made for the trouble and expence of raising any species of vegetable which yields profit.

6. Mixed tithes are those which arise, not immediately from the profit of the land, but from the produce and increase of animals nourished by the land.

7. Personal tithes are the profits which arise from the labour and industry of man, employing himself in some trade or employment; being the tenth of the clear profits, after deducting all expences.

8. Tithes are again divided into great and small. Where the tithe of a thing is *magnus ecclesiæ præventus*, it is reckoned among the great tithes. Where it is *parvus ecclesiæ præventus*, it is considered as a small tithe. Thus the tithes of corn, hay, and wood are called great tithes; because they are in general of much greater value than any other species of tithes. And the predial tithes of other less valuable vegetables, together with mixed and personal tithes, are called small tithes.

Norton v.
Clark,
Gwill. 428.

9. It was formerly doubted whether the distinction between great and small tithes arose from the nature of the vegetable, or from the quantity of it in any particular parish. But it is now settled that the

quantity of any particular vegetable raised in a parish, cannot alter the nature of the tithe ; for in that case, corn and hay might in some parishes be a small tithe ; and in conformity to this principle, Lord Hardwicke held, that the tithe of potatoes, though sown in great quantities in common fields, was a small tithe.

Smith v. Wyatt, Gwill. 777.

10. This doctrine has been confirmed by a determination of Lord Henley, who held that tithes are by law denominated and adjudged to be great or small, according to the nature of the vegetable ; not from the mode of cultivation, or the use to which it was applied.

Simms v. Bennett, 7 Bro. Parl. Ca. 29.

11. The tithes of all those vegetables that have lately been introduced into England, such as hops, madder, and woad, are deemed small tithes.

12. Predial tithes, consisting of the immediate produce of land, are due of common right ; it being a principle of the common law, that all lands ought to pay tithes. But mixed and personal tithes are only due by custom ; therefore where they have not been usually paid, they are not demandable.

How and when due. 11 Rep. 15 a.

13. It was formerly held, that tithes were only payable of such things as yield an annual increase ; but this rule has been deviated from, in the case of some vegetables, which produce a crop only every second or third year ; and in the case of underwood or coppice, which is only cut once in seven or ten years.

14. It was also formerly held, that tithe was only due once in the same year ; but it has been determined, in two modern cases, that if divers crops are grown on the same land, in the same year, tithe is payable of each of them.

2 Inst. 651, Bunb. 10. 314.

15. It has also been resolved in several cases, that no tithe is due of that which produces another

2 Gwill. 562.

titheable substance : but this rule has also been deviated from in modern times.

Of what
Things pre-
dial Tithes
are due.

1 Gwill. 429.

16. With respect to predial tithes, it is a general rule, *Quod quicquid oritur ex prædio ejusdem sunt prædiales*. Of these predial things, some are *fructus naturales*, which grow naturally, without the industry or labour of man ; as grass, &c. : and others are *fructus artificiales vel industriales* ; to the growth of which, industry and labour are requisite ; as corn, &c. The tithes of these are called *decimæ provenientes*, and *decimæ fixæ* ; because they arise *ex fructibus stirpis in terra fixæ*.

Corn and
other Grain.

2 Inst. 651.
12 Mod. 235.
Gwill. 477.
562.

17. Corn is a predial great tithe, of which the tenth cock, shock, or sheaf, is due ; unless where the custom of the place is otherwise. But no tithe is due for the rakings of corn involuntarily scattered, unless where the rakings are of great value, or are left on the land covinously ; in which cases tithe is payable for them.

Gwill. 477.

18. It is laid down, that no tithe is payable for stubble : 1st, Because the corn is titheable, which is the principal, and the stubble is of no value ; 2d, Because, in the case of stubble, there is no second renewing. And in a subsequent case, it was held, that stubble used partly for fodder, and partly for manure, was not titheable ; the whole of it being used in husbandry. But that this did not extend to a farmer who left an unusual quantity of stubble, in order to make a fraudulent profit of it.

Id. 1438.

Austin v.
Nicholas,
Gwill. 615.
Nicholas
v. Elliot,
Bunb. 19.

19. Every other species of grain, such as beans, peas, &c., cultivated for sale, are titheable ; and whether they are set, drilled, sown, or planted in rows, in a garden-like manner, they are small tithes ; but in some cases peas and beans have been considered as a great tithe.

20. Tares and vetches are titheable, unless they are cut green, and given as food to milch kine, and horses employed in husbandry. *Bunb. 279.*

21. Hay is subject to the payment of tithe, notwithstanding beasts of the plough or pail, or sheep, are fed therewith; it was also formerly held, that a right to tithe of hay accrues upon the mowing of the grass; and that the application of it, either while it was in grass, or after it was made into hay, to feeding beasts of the plough or pail, did not take away the right to tithe. *Hay. Cro. Ja. 47. 9 Vin. Ab. 13.*

22. In a subsequent case, however, it is laid down, that if a person cuts grass, and while it is in the swarth, carries it, and feeds his plough cattle therewith, not having sufficient sustenance for them otherwise, no tithe is due thereof. *Crawley v. Wells, 1 Roll. Ab. 645. Collyer v. Howse, Anst. 481.*

23. It is laid down in several cases, that tithe is not due of aftermath, because it was formerly held, that tithe could only be due once in the same year, from the same ground. But in 33 Cha. II. the Court of Exchequer was of opinion, that, of common right, tithes of aftermath, or of the after-crop of grass mowed, there being no prescription or custom against, or in discharge of the same, ought to be paid. And Doctor Burn says, the modern determinations have been, that the aftermath of meadow is part of the increase of the same year, and consequently titheable. *Margetts v. Butcher, Gwill. 531.*

24. Clover, saintfoin, and ryegrass, being considered as a species of hay, are titheable; and a second crop of clover is titheable as well as the first. The tithe of this species of hay belongs to the person entitled to the tithe of common hay, and is therefore a great tithe: but no tithe is due of clover or vetches cut green, and given to cattle used in husbandry. *Gwill. 530. 584. Wallis v. Pain, Gwill. 755. Hayes v. Dowse, Gwill. 679. Vid. id. 1504.*

Underwood. 25. By the statute 45 Edw. III. c. 3. it was enacted, that great wood of the age of 20, 30, or 40 years, or upwards, should not be titheable; but that *sylva cadua*, or underwood, should be titheable.

2 Inst. 642.
3 Rep. 12.

26. Lord Coke says, two doubts arose on the construction of this act. First, what should be said great wood. The answer was, that in this act the word *grosse* signified such wood as had been, or was, either by the common law, or custom of the country, timber; for the act did not extend to other woods, that had not been, or would not serve for timber; though they were of the greatness or bigness of timber. So that oak, ash, and elm were included within the words great wood: and so was beech, horsebuck, and hornbeam; because they served for building or reparation of houses, mills, cottages, &c.; contrary to the opinion of Plowden, 470, which the Conrt, upon deliberate advice, held not to be law.

Soby v.
Molins.

2 Inst. 643.

27. Secondly, of what age those *grosse* or timber trees should be. The statute resolved this doubt in these words, "great wood of the age of 20 years or upwards:" which point was also declaratory of the common law.

28. Tithe is in general due of beech, birch, hazel, willow, sallow, alder, maple, and white-thorn trees, and of all fruit trees, of whatever age they are; because the wood of these trees is not usually employed as timber. But if any of these trees have been used as timber, they are not titheable.

Walton v.
Tryon,
Gwill. 827.

29. In a case where tithe was demanded of beech of above twenty years growth, Lord Hardwicke said, this depended on the question of fact, whether beech was timber by the custom of the country; and that the issue should be, whether, by the custom, beech

growing within the parish of M. were, and had used to be deemed timber.

30. It is said by Lord Coke, that no tithes shall be paid of *sylva cædua* employed in hedging, or for fuel, or for maintenance of the plough or pail. In a subsequent case it was determined, that where a person cut down underwood, for the purpose of fencing his own corn, it was not titheable. But a custom that underwood cut and used for fencing of corn generally, whereof tithes were payable, and not sold or otherwise disposed of, should be discharged from the payment of tithes, was held void.

2 Inst. 651.
Gwill. 562.

Croucher
v. Collins,
Gwill. 1576.

31. This doctrine has however been contradicted in a case where, on a bill brought for tithes of wood, the defendant said he felled yearly, at ten years growth, five acres of wood, worth 25 shillings an acre, which he used in mending his hedges, and upon his land; so was of no profit to him. But decreed to account.

Smith v.
Williams,
Gwill. 608.

32. Tithe is not due of *sylva cædua* used in making or repairing carts or ploughs, to be employed in husbandry, in the parish wherein the wood grew; because by the use of carts and ploughs the tithe of other things is increased.

Anon. Gould.
R. 93.

33. If the tithe of hops and the tithe of wood are both due to the same person, tithe is not due of *sylva cædua* used in poling the hops; because the tithe of the hops is increased by the use of the poles.

Anon. Bunb.
20.

34. By the common law, tithe is payable of wood employed in the house for fuel; but there may be a custom, that it is not titheable.

Gwill. 828
969.

35. Where trees are considered as timber, either by common law, or by custom, no tithes are to be paid of the lops or tops of such trees, for whatever

Walton
v. Tryon,
Gwill. 327.

use they are cut : with this exception, that in certain peculiar cases, where a fraud is actually attempted, or from necessity to avoid fraud, they may be titheable.

Hemp, Flax,
&c.

36. Hemp and flax are titheable ; but to encourage the growth of these articles, it is enacted by the stat. 11 & 12 Will. III. c. 16. that every person who shall sow any hemp or flax shall pay to the parson, vicar, or impropriator yearly, the sum of five shillings, and no more, for every acre of hemp and flax so sown, before the same is carried off the ground. Madder is titheable in the same manner.

Hops and
Turnips.
Knight v.
Halsey,
8 Bro. Parl.
Ca. app.

37. Hops are titheable, and accounted among small tithes : the tenth of this vegetable is to be paid after they are picked, and before they are dried.

Gwill. 606.

38. Turnips are also titheable when severed ; though there be more crops than one in the year. In a bill for tithe of turnips, the defendant insisted that no tithe was due for turnips sown after corn the same year ; and that he ought not to pay tithe for any crop or profit of arable land, the same year that the parson received tithe-corn from the same ground ; but the tithe was decreed.

Agistment.

39. The profits arising from the agistment or pasturage of cattle are titheable of common right ; because the grass that is eaten is titheable, and must have paid tithe, if cut when full grown. It is predial, because it arises immediately from the land. And in a modern case, it was held to be a small tithe.

Sear v. Trin.
Coll. Gwill.
1445.
1 Wils. R.
170.

2 Inst. 651.
Bunb. 446.

40. Agistment tithe is only payable for dry or barren cattle, that otherwise yield no profit to the parson, and not for cattle which are kept for the plough or pail, in the same parish ; because the parson has tithe for them in another way.

41. Agistment tithe is not payable for horses kept for husbandry, saddle-horses, coach-horses, or other horses used merely for pleasure. But where coach-horses were used in carrying coals and manure into another parish, an agistment tithe was held to be payable for them. Thorp v. Bendlowes, Gwill. 899.
42. Meadow grounds which have paid tithe of hay, are not afterwards liable to an agistment tithe. Ayd v. Flower, Gwill. 613. *contra* Burn, Vol. 3. 448.
43. Agistment tithe is payable by the occupier of the ground, not by the owner of the cattle; and as this tithe cannot be taken in kind, the person entitled to it can only receive what it is valued at, according to the price paid for the keeping of different beasts. Bunb. 3. Burn. Vol. 3. 448.
44. An agistment tithe was held to be due for turnips sown after corn, and not severed, but eaten by unprofitable cattle: though it was urged to be an improvement of the land, and that the parson had the benefit of it in the next year. Crow v. Stodart, 3 Burn, 465. Gwill. 714.
45. All garden herbs and plants, such as parsley, sage, cabbage, &c., are titheable; and the same is a small tithe. But most commonly a sum of money is payable in lieu of tithes of gardens, either by custom, or by agreement. Gardens. 3 Burn Eca. Law, 466.
46. All fruits of trees are titheable; the tithe to be paid when they are gathered. If they are stolen, the parson as well as the owner shall bear the loss; but if the owner suffer a stranger to take his fruit, the tithe shall be answered. Id. 466.
47. A claim was made in the year 1780, by the vicar of Kensington, to the tithe of hot-house plants. The Court of Exchequer was of opinion, that they were titheable; on an appeal to the House of Lords, the case went off on another point. It has, however, been determined by the Court of Exchequer, in a Adams v. Waller, Gwill. 1204. Hewitt v. Adams, 7 Bro. Parl. Ca. 64.

Worrall v.
Miller,
Mich. 1801.

subsequent case, that hot-house plants are not titheable.

Of what
things mixed
Tithes are
due.

48. Mixed tithes consist of the tenth of the young of cattle bred in the parish ; such as calves, lambs, pigs, &c. ; and the time of payment of these is when the animals are weaned, and able to live without the dam : unless the custom of the place be otherwise.

3 Burn, 468.

49. The wool of sheep and lambs is another mixed tithe ; and is, *de jure*, due at the time it is clipped ; but by prescription it may be set out altogether at another time.

Idem, 476.

50. Milk and cheese are titheable. But where tithe milk is paid in kind, no tithe cheese is due ; and where tithe cheese is paid in kind, no tithe milk is due.

Of what
Things per-
sonal Tithes
are due.

51. By the stat. 2 & 3 Edw. VI. c. 13. it is enacted, that every person exercising merchandise, bargaining and selling, cloathing, handicraft, or other art or faculty, who had, within 40 years preceding, paid personal tithes, should pay for his personal tithes the tenth part of his clear gains ; his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, and deducted.

Gwill. 430.

52. It was formerly held, that in consequence of this statute, the fees of a lawyer, physician, attorney, and a man's salary, were titheable. But Doctor Burn observes, that personal tithes are now scarce any where paid, except for mills, and fish caught in the sea.

Ecc. Law.
vol. 3. 474.
Vide 2 Bro.
P. Ca. 446, 7.
Id. 3.

What Things
are not
titheable.
2 Inst. 651.

53. There are several things which are not titheable by common right, though in some places they may be titheable by custom. Thus, no tithes are payable for quarries of stone or slate ; nor for mines of tin, lead, coal, lime, chalk, marl, or the like. For

these are of the substance of the earth, and not an annual produce.

54. Houses are not titheable at common law, for the same reason. But by custom tithe is, in some towns, due for houses; in a proportion to the rent reserved for them. And in the city of London, tithes are payable for houses by act of parliament. Wats. c. 46.
Bunb. 102.
106.

55. Forest lands are not titheable, provided they are in the hands of the King or his lessee. But if a forest is disafforested, and within any parish, the lands then become titheable. 3 Burn. 393.

56. By the statute 2 & 3 Edw. VI. c. 16. all barren heath and waste ground which is improved, and converted into arable or meadow, shall not pay tithes for seven years after such improvement. 2 Inst. 655.

57. No tithe is due at common law for animals that are *feræ naturæ*; such as deer, rabbits, &c. But, by the custom of many places, some animals of this kind are titheable. Id. 651.
Gwill. 427.
840.

58. Before the council of Lateran, which was held in the year 1180, every person was at liberty to pay his tithes to whatever church or monastery he pleased; or he might pay them into the hands of the bishop, who distributed the revenues of his church among his diocesan clergy. When dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister, first by common consent, or appointment of the lord of the manor, and afterwards by law. To whom
Tithes are
payable.

59. The tithes of each parish are therefore of common right due to the parson thereof. And Lord Coke says, that *persona impersonata*, parson impersonæ, is the rector that is in possession of the church parochial, *jure ecclesiæ*. Rectors or
Parsons.
1 Inst. 300 a.

Portionists.

2 Rep. 44 b.
2 Roll. Ab.
161.

60. It sometimes happens that one person has a part of the tithes within the parish of another, which is called a portion of tithes; and the person entitled to it is called a portionist. These portions are supposed to be prior to the council of Lateran, when it was lawful for every one to distribute his tithes, or any portion thereof, to whatever church he pleased. And a portion of tithes does not become extinct by vesting in the same hands with the rectory.

Vicars.

1 Burn, 60.

61. When the practice of appropriating the advowsons of rectories or parsonages to monasteries, was introduced; the monks usually deputed one of their own body to perform divine service and other duties in those parishes, of which the society was rector; who was called the vicar. But by several statutes it was ordered that such vicar should be a secular priest, and sufficiently endowed, at the discretion of the ordinary. The endowments were usually of the small tithes; the greater or predial tithes being still reserved to the monastery; from whence arose a division of tithes into rectorial and vicarial.

Greene v.
Austin,
Gwill. 226.

62. The rector or parson is *primâ facie* entitled to all the tithes of the parish; therefore payment of tithes to the rector is a sufficient discharge against the vicar; because all tithes of common right belong to the rector, and the vicarage is derived out of the parsonage. So that no tithes belong *de jure* to the vicar, but only on an endowment, or by prescription, which ought to be shown on the part of the vicar; and the Court cannot intend it; for the vicarage is a diminution or impairing of the parsonage, of which the Court will not take notice, unless the parties show it.

63. Where the vicar produces an endowment, then the situation of the parties is reversed. The *prima facie* title to the extent of that endowment is in favour of the vicar; and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In this case it is incumbent on the rector to give such clear and cogent evidence of an usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption, that the parties interested in the tithes had come to a new agreement: that some different arrangement had been made with respect to the distribution of the tithes, between the date of the endowment, and the disabling statute of Queen Elizabeth.

Awdry v.
Smallcombe,
Gwill. 1526.

64. It has been determined, that if a vicar hath for a long time used to take particular tithes or profits, he shall not lose them because the original endowment is produced, and they are not there. For every bishop having an indisputable right to augment vicarages, as there was occasion; and this whether such right was reserved in the endowment or not: the law will therefore presume that this addition was made by way of augmentation.

Bunb. 74.

65. The loss of the original endowment is supplied by prescription; that is, if the vicar hath enjoyed any particular tithe for a long time, the law will presume that he was legally endowed of it; for the same reason that it presumes some tithes might have been added by way of augmentation, which were not in the original endowment.

Idem.

66. In those places which are not within any parish, as in forests and the like, the King is entitled to the tithes, because he is not a mere layman, but

The King.
2 Rep. 44 a.
2 Inst. 647.

persona mixta. This point was resolved in parliament 5 Edw. III. in a suit between the Crown and the bishop of Carlisle, who claimed the tithes of the forest of Inglewood.

Lords of
Manors.
2 Rep. 45 a.

67. Lords of manors may be entitled to the tithes of the manor, by prescription. For in such a case it will be supposed that the lord was seised of the whole manor, before the tenancies were derived thereout; and then by composition or other lawful means, the lord acquired the tithes, paying a certain pension to the parson.

Lay Impro-
priators.

68. When the monasteries were dissolved by king Henry VIII. the appropriation of the several benefices which belonged to the religious houses would, by the rules of the common law, have become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the Crown; to vest such appropriated benefices in the King, in as ample a manner as the monasteries had held the same, at the time of their dissolution.

Crathorne v.
Taylor,
2 Bro. Parl.
Ca. 512.

69. Almost all these appropriated benefices have been granted by the Crown to lay persons; and are now held by their descendants, or by those who have purchased them from such grantees. These are called lay impropriators; and by several statutes they have the same rights, respecting such benefices, as if they were religious persons.

70. Grants of this kind are either of the rectory or parsonage, which comprises the parish church with all its rights, glebes, tithes, and other profits whatsoever; or else of the tithes of a particular tract of land.

Wats. 509.

71. Where a portion of tithes was vested in the Crown, and afterwards granted to a layman, he acquired the same right to it as the spiritual person in

whom it was originally vested. Portions of tithes might also formerly be granted by religious corporations to laymen, to whom they may now belong under that title.

72. By the statute 32 Hen. VIII. c. 7. § 7. it is enacted, that all persons having any estate of inheritance, freehold, term, right, or interest, of, in, or to any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which were or should be made temporal, shall have the same remedies for recovery thereof, as for lands and tenements.

73. With respect to the estate which lay impropiators are capable of having in tithes, they may be tenants in fee simple, fee tail, for life or years. Husbands shall be tenants by the curtesy, and widows endowed of them. They are accounted assets for payment of debts, and have all other incidents belonging to temporal inheritances.

What Estate they may have.

74. An estate in tithes may be held in joint tenancy, coparcenary, or in common; and a partition of any of these may be obtained by a bill in Chancery.

75. On a bill for a partition of tithes and casual profits in the Isle of Wight, the defendant demurred, upon the ground that there were no casual profits, and that it might be divided upon a writ of partition.

Barter v. Knollys,
1 Ves. 494.

Lord Hardwicke said,—“An ejectment will lie of tithes, of which the execution is a writ of possession; and the sheriff may do as much on partition as on a writ of possession on ejectment. This is not casual, whether tithes will rise or not. I do not doubt but this Court can divide them, as it may several things which cannot at law. Overrule the demurrer, therefore.”

76. Estates in tithes are alienable by lay impropriators, in the same manner as other real estates; and are comprehended within the statute of uses, under the word *hereditaments*.

77. It should, however, be observed, that no good title can be made to tithes, by a lay impropriator, without showing the letters patent by which the tithes, or the rectory or parsonage to which they are annexed, were granted by the Crown to some lay person; for this is the only mode of repelling any claim which may be made to those tithes by an ecclesiastical person claiming *jure ecclesiæ*. The letters patent should be inspected, to see that no reversion remains in the Crown.

Of Exemptions from Tithes.

2 Rep. 44 a.

3 Burn, 410.
414.

infra.

Real Composition.

2 Inst. 490.
Gwill. 801.

78. With respect to exemptions from tithes, it should first be observed, that by the old law no layman was capable of having tithes, nor allowed to prescribe generally that his lands were exempt from the payment of tithes; for, without special matter shown, it should not be intended that he had any lawful discharge: therefore, the mere non-payment of tithes, though for time immemorial, does not amount to an exemption, and cannot be pleaded against a spiritual person, without setting out and establishing the causes of such exemption, except in the case of portionists. Lands may, however, be exempted from the payment of tithes by real composition, by a special prescription, which is either *de modo decimandi*, or *de non decimando*, or by act of parliament.

79. A real composition is where an agreement is made between the owner of lands and the parson or vicar, with the consent of the patron and ordinary, that his lands shall in future be freed from the pay-

ment of all tithes, in consideration of some land, or other real recompence, to the parson or vicar, in lieu and satisfaction of such tithe. This kind of composition was formerly permitted, because it was supposed that the clergy would be no losers by it, as the consent of the ordinary, whose duty it was to take care of the church in general, and of the patron, whose interest it was to protect that particular church, were both required, to render the composition effectual.

80. No composition can be good, unless it was made before the 13 Eliz. ; for, by a statute made in Tit. 32. c. 2. that year, it is enacted, that no parson or vicar shall make any conveyance of the estates of their churches, other than leases for three lives or 31 years. And though there have been several decrees made by 7 Bro. Parl. courts of equity to confirm compositions, made with Ca. 34 & 44. the consent of the parson, patron, and ordinary, subsequent to the 13 Eliz., still they are not held to be binding on the succeeding incumbents.

81. It was formerly held, that a composition real could not be established without showing the deed by which it was created, or proving the actual existence of such deed. It was, however, laid down in a modern case, that although, in order to establish a real composition for tithes, it was not now considered as absolutely necessary to produce the deed, yet evidence must be given of such deed having existed. That where such evidence rests on reputation, such reputation must be distinctly of payments having been made under such a deed, and that those payments had their origin under an instrument made within time of memory ; otherwise it will be evidence of a prescriptive payment. That although the Court had very properly relaxed in its practice, and did not now, as formerly, insist upon the production of the

Hawes v. Swain,
2 Cox. R.
179.

original instrument, yet they certainly expected that, in order to establish a real composition, the evidence should show something that could distinguish it from a prescriptive payment.

Sawbridge
v. Benton,
Anstr.R.372.

82. In a subsequent case it was said, that where there has been a composition real, within time of memory, its commencement must be shown, though it is not necessary to produce the deeds under which it took place. Presumptions are admitted in this, as in other cases; and the existence of such deeds may be inferred from other evidences. It is not necessary that the consent of all the parties should be by the same deed: this may frequently not happen. In the case of the King, who consents by letters patent, it never can take place. But that a composition real could not be supported by evidence of immemorial payment.

Prescription
De Modo
Decimandi.

83. A prescription *de modo decimandi*, usually called a *modus*, is where an immemorial custom has established a particular manner of tithing, different from the general way of taking tithes in kind; and the circumstances which are necessary to make a good and sufficient *modus*, are laid down by Sir W. Blackstone and Doctor Burn.

2 P. Wms.
573.

84. It is probable that every *modus* had its commencement by deed; because a composition for tithes can never become a *modus*, unless the patron and ordinary be parties thereto, or it be confirmed by them. But a *modus* may be prescribed for, without producing the deed by which it was created; for, wherever there has been a constant annual payment for time immemorial, it shall be intended that such payment had a proper commencement.

85. In the case of hemp, flax, and madder, it has been stated, that a *modus* is established by act of parliament.

86. A prescription *de non decimando* is a claim to be entirely discharged from tithes, and to pay no compensation for them. This may be a privilege annexed either to the persons holding the lands, or to the lands themselves.

Prescription
De non De-
cimando.

87. The King being *persona mixta*, is not only capable of having tithes, but may also prescribe to be discharged from the payment of tithes; therefore, lands lying within a forest, and in the hands of the King, do not pay tithes, although they are within a parish. But this privilege only extends to the King's lessee, not to his feoffee.

Cro. Eliz.
511.
Hard. R. 315.
Hertford
v. Leech,
W. Jones,
387.

88. Spiritual persons, or corporations, being capable of having tithes in perannuity, may prescribe to be discharged generally; so that no tithe shall be paid of their lands, nor any recompence for them. Besides, it is a maxim of law, that *ecclesia decimas non solvit ecclesie*; and a spiritual person may prescribe *de non decimando*, for himself, his farmers, and tenants, and also for his copyholders. For, by this means, it is to be presumed that the spiritual person has greater fines and rents.

4 Rep. 44 a.

Crouch v.
Frier,
Cro. Eliz.
784.

89. The rector or parson of a parish is not liable to the payment of tithes to the vicar, nor the vicar to the rector; and a lay rector is also exempted from paying tithes to the vicar out of the glebe, as long as he holds it in his own hands; but upon the death of the spiritual or lay rector, or of the vicar, his executor is liable to the payment of tithes out of the growing crop.

Blenco v.
Marston,
Cro. Eliz.
479. 578.

90. A prescription *de non decimando* may also be annexed to the land itself, though in the possession of lay persons; but this can only arise from the following circumstances.

2 Comm. 32. Spiritual persons, or corporations, were always capable of having their lands totally discharged of tithes by various ways.—1. By real composition. Hob. 309. 2. By papal bulls of exemption. 3. By unity of possession; as when the rectory of a parish, and the lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession. 4. By prescription; having never been liable to tithes, by being always in spiritual hands. 5. By virtue of their order; as the Knights Templars, Cistercians, and others; whose lands were privileged by the Pope with a discharge of tithes.

91. These exemptions from tithes would have ceased upon the dissolution of the abbeys, and the lands become again subject to tithes, were it not enacted by the statute 31 Hen. VIII. c. 13. § 21.; that all persons who should come to the possession of the lands of any abbey then dissolved should hold them free and discharged of tithes, in as large and ample a manner as the abbeys formerly held them.

2 Comm. 32. And Sir W. Blackstone says, that from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free. For, if a man can show his lands to have been such abbey lands, and also immemorially discharged from tithes, by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

Lamprey
v. Rooke,
Amb. R. 291.

92. These exemptions from tithes only extended to the lands of the religious houses, *quoadmodum propriis*

manibus excoluntur ; not when in the occupation of their lessees or farmers. And it was formerly held, that this exemption applied only to those who had an estate of inheritance, and not to tenants for life. It has, however, been resolved, that a tenant for life, under a settlement, is entitled to the exemption.

Wilson v.
Redman.
Hard. 174.

93. A person was tenant for life, under a settlement, of lands which were formerly part of the possessions of the Cistercian order, and by that means exempt from tithes, while in the manurance of the owner. It was contended, that the tenant for life had not such a quantity of interest as would support that privilege : that to entitle the lands to that exemption, the person occupying them must be owner of the inheritance ; he must have the same estate in him which the monastery had. In the case of Wilson v. Redman, the Court held that tenant for life or years was not within the statute, but that tenant in tail, who had an estate of inheritance, was discharged *quamdiu propriis manibus*, &c. Lord Ch. B. said, it was admitted that a tenant in tail was entitled to the exemption claimed ; but it was argued, that a tenant for life, under a settlement, was not. It was said, that the tenant must hold the lands as the monastery held them, else the privilege could not attach. But it was impossible that the lands could now be holden precisely in the same manner as they were holden by the monastery. The monastery had them to them and their successors. Now, a man had them to him and his heirs. But a fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee. Where would be the difficulty to say, that the tenants of each portion should have the benefit as they succeed. The case of Wilson v. Redman had been cited ; but from an extract from the

Hett v.
Muds, in
Schach. 1799.
Gwill. 1515.

answer in that case, with which he had been furnished, the parties there appeared to have had a fee simple; and therefore, that not being a case in which it was necessary to decide the point, it could not be considered of any authority. He could not see any reason why a tenant for life should be excluded from the benefit, any more than a tenant in tail; who, it was agreed, was exempt. There seemed to be no reason why all the component parts of the estate should not be exempt, as they severally came into possession. The Court decreed unanimously, that the tenant for life was exempt.

Act of Parlia-
ment.

94. Lands may and are now frequently exempted from the payment of tithes by acts of parliament. Thus in many of the modern inclosure acts, the lands inclosed are for ever freed and discharged from the payment of tithes; and a portion of land is allotted to the spiritual or lay rector, or to the vicar, their successors and heirs, in lieu of them. In other acts of this kind, a corn rent is substituted in the place of tithes.

Non-pay-
ment of
Tithes cannot
be pleaded
against a Lay-
man.
ante, § 78.
2 Rep. 44 b.
Hob. 295.

95. The doctrine that mere non-payment of tithes, though for time immemorial, does not amount to an exemption, was established in favour of the church. For in all other cases long acquiescence creates a title; therefore, when lay persons became capable of holding tithes, this principle ought not to have been extended to them, because they are not within the reason of it. But it has been held in several cases, that a general prescription *de non decimando* can no more be set up against a lay impropriator than against a spiritual person.

Bury Corp.
v. Evans,
Com. R. 643.

96. Upon a bill for small tithes by a lay impropriator, it was proved by several witnesses that they never knew small tithes paid for. It was contended,

that in the case of a lay impropriator the defendant might say, in bar of the demand of tithes, that no tithes had ever been paid or demanded for these lands; and although there was no express determination on the point, yet many Judges were of that opinion.

Bupb. 284.

The Court held the defence bad.

97. A bill was brought in the Exchequer by a lay impropriator, for tithe of hay and potatoes. The defence was, that no tithe had ever been paid for the land, nor any *modus* or composition. It was said for the defendant, that the reason why a layman should not prescribe in *non decimando*, was founded on principles which did not hold since tithes were lay inheritances. That now, from length of time and possession, there was the same reason to presume a grant from the lay impropriator, in this case, as in cases of other inheritances. That this was not used as a prescription, but as an evidence of right, and to include a presumption of a grant. That before laymen were capable of tithes, an exemption was not sufficient to arise from non-payment of tithes only; but since, it was quite otherwise; and possession in the hands of a layman was as good evidence of a right to tithes, as of any other right.

Fanshaw v. More,
Gwill. 780.
17 Geo. 2.

Lord Ch. B. Parker was of opinion, that a layman could not prescribe in *non decimando* against a lay impropriator, no more than against a spiritual one. It had been said that the statute of Hen. VIII., which made tithes lay inheritances, had altered the case; but as a prescription from that time would not be good, consequently that statute could not create a right by prescription. That this doctrine was not inconvenient, for grants of tithes might be preserved by enrolment; therefore were not likely to be lost, if

due care was taken of them. That an act of parliament was attempted to remedy this by Sir George Heathcote, about fifteen years before, which miscarried. Baron Carter was of the same opinion ; but Baron Reynolds doubted.

Baron Clarke said he knew no case which deserved more consideration, for though the authorities against such a prescription were very great, yet the reason of them grew weaker every day. Before the reformation all tithes were ecclesiastical, and a layman could have tithes by way of discharge only, by the grant of patron, parson and ordinary. Since that, there were other ways, both of having tithes, and of being discharged from them. Since tithes had been in the hands of lay impropriators, many persons had purchased discharges for their particular lands ; yet if such grants were lost by the common fate of things, those persons must lose the benefit of their purchases ; and that must often happen, though they were enrolled, or any other way was taken to preserve them. Very few records of the church were extant ; and it would be very hard that time, which strengthens all other rights, should weaken this. It seemed very extraordinary that a layman might prescribe, upon the presumption of a grant, for a portion of tithes in the soil of another, even against the rector of the parish, and yet could not prescribe for the tithes of his own land in the same way. If therefore he should concur in this opinion, it would be merely from the force of authority ; for he thought that the reason of the thing was strong against it. He allowed that, in general, authorities ought to prevail in law ; because great inconveniences and confusion would arise from overturning established rules of property. But in this

infra, § 101.

particular case, the inconveniences and confusion of property would be much greater from pursuing those resolutions, than from overturning them.

Mr. Joddrell, from whose notes this case was taken by Mr. Gwillim, says he was informed that judgement was given for the plaintiff.

98. The plaintiff sued in the Exchequer as lay impropriator of the parish of L. for tithe of hay and agistment. The defendant insisted, that from tithes of hay never having been paid to the rector, within memory, a conveyance of them to the landholder should be presumed.

Nagle v. Edwards,
3 Anstr. 702.

Lord Ch. B. Macdonald said, the plaintiff having made out to himself a clear title as rector, the defendant insisted on exemption from payment of hay and agistment tithe, on the ground of never having paid these tithes. From non-payment he wished the Court to presume a grant or conveyance of these tithes from the lay impropriator. It was clear that, against an ecclesiastical rector, this defence could never be set up in any shape. Whether a lay impropriator should have the same benefit was at first doubted; but that point seemed at rest. Three successive decisions upon it had fully established that there was no difference between a lay and an ecclesiastical rector.

99. In a subsequent case of this kind, the same Judge said,—“It is now established by many cases, too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay fee. If non-payment for any length of time forms no presumption of a grant of the tithes; then the length of

Petre v. Blencoe,
3 Anstr. 945.

enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. In the present case it is hardly credible that the plaintiff's family have omitted for above two centuries to exert this right, from mere forbearance or negligence. Some other transaction probably took place between the parties, the memory of which is now lost. But the cases prevent us from deciding upon the ground of such a presumption."

Rose v.
Calland,
5 Ves. 186.

Birney v.
Harvey,
17 Ves. 119.

Vide Tit. 31.
c. 2.

Long Possession of a Portion of Tithes creates a Title.

100. Lord Loughborough appears to have been inclined to differ from these cases, and to hold that non-payment alone might be set up as a defence to a claim of tithes by a lay impropriator; but Lord Eldon has decidedly upheld them. And it appears to be now settled, that a prescription *de non decimando* can no more be set up against a lay impropriator, than against a spiritual person; as such a prescription must have its origin at a time when the church was incapable of alienating its possessions. But the claim of a lay impropriator may be repelled by evidence of a grant of the tithes from some preceding lay impropriator.

101. It has been stated, that portions of tithes were severed from rectories before the council of Lateran; and therefore no claim can be made to them, but by persons deriving a title, either from the Crown or some ecclesiastical corporation, who had a power of alienation. It follows, that there is a material difference between a prescription *de non decimando*, and a claim to a portion of tithes; for, in the latter case, if the claim be supported by evidence of actual peramancy and enjoyment for a long time, a court of equity will not interfere; but leave the parties to their legal remedy.

102. The plaintiff brought his bill for an account of tithes: the defendant insisted, by his answer, that he and they whose estate he had in the lands, whereof the tithes were demanded, had a title to the tithes. It was in proof in the cause, that the defendant and those under whom he claimed had been in possession above 100 years: and several conveyances intervening, without any claim from the plaintiff or his ancestors; it was insisted that there had been a severance of the tithes from the rectory; or that there had been some grant or deed, whereby the plaintiff's ancestors, or those who had the right to the rectory, had exempted the defendant's estate from the payment of tithes.

Fanehaw v.
Rotherham,
Gwill. 1177.

Lord Henley was of opinion that this, by the grant, became a lay fee; and the dispute, as between those entitled to the spiritual fee or rectory, must stand on the same foot, and be determined by the same law, as any other right or fee. In this case the plaintiff made no particular title at all; he would have the Court presume that his right descended to him, but did not show any one family settlement, &c. for a great number of years (above forty) where this was mentioned; and yet he prayed the Court to interpose against a possession which had been in the defendant and his ancestors above a century. It was urged that the law says, *caveat emptor*; but equity says, *teneat emptor*, if he is a fair purchaser. The defendant appeared to him as a fair purchaser, there having been several intermediate conveyances, and possession having gone along with them, for above 130 years; and therefore equity would not interpose to disturb him. If the plaintiff had any title at law, he might pursue it. But equity would not interpose against a fair possessor, only because the plaintiff was afraid his title might fail at law. The bill was dismissed.

Scott v. Ayrey, Gwill.
1174.

103. Doctor Scott, being rector of Simonburne in the county of Northumberland, filed his bill in the Court of Exchequer for the tithes of corn and grain of a farm called Eal's farm. The defendants, the Ayreys, were owners of part of the lands, and claimed the tithes of Eal's farm. The question was, whether the plaintiff was entitled to the tithes of corn and hay of the lands of which the Ayreys claimed the tithes.

The Lord Ch. B. said—This was not a demand of tithe of land, which had hitherto paid no tithe ; and that the defence was not a prescription *de non decimando*. In all such cases the rule had been, that a person setting up an exemption from the payment of tithes, must show the particular ground of exemption. If that was not shown, the defence amounted to no more than a mere non-payment of tithe, which, however long, was no defence ; but in the present case the plaintiff claimed the tithe of land, of which tithe had been constantly taken : for although a part of the land had not actually paid tithe, it had been no otherwise exempt, than because the tenant of that part had been tenant of the tithe of all. The tithes having been actually paid, the next question was, how they had been paid ;—they had been paid from particular lands in the nature of a portion of tithes. It appeared, that in the year 1608, these tithes were in the possession of the family of Ridley : that they were sold in 1683 to one Whitfield : that in 1708 they were conveyed to Green in fee. They were afterwards mortgaged ; and the devisee of the mortgagee purchased the equity of redemption, and devised to persons under whom the defendants claimed. For 170 years they had been the subject of sales, mortgages, and devises, as other property ; and had always been considered in the same light as the other real property

of the persons who from time to time had claimed them. They were capable of being enjoyed by the persons who had enjoyed them; and the question was, whether a court of equity ought to interfere to take the possession from persons who had been in possession for so many years, with knowledge of the rector. It did not appear how the Ridleys became entitled; but it appeared that, being in possession, they settled, mortgaged, and devised these tithes as their own absolute property. If, notwithstanding this long possession, the plaintiff was legally entitled, he was not without remedy; but it was too much in a case of this kind for a court of equity to interpose, and after so long a possession, to take the property from the possessors, and decree the rector to be entitled to it. The Court had been pressed to direct an issue, but there seemed no reason to interfere thus far. Whether the Court directed an issue, which adopted in some degree the plaintiff's demand, or left the plaintiff to pursue his legal remedy, he might make good his demand, if it was well founded. It was therefore not absolutely necessary for the Court to interpose.

Mr. Baron Eyre said—The principal question in this case was, the defence set up by the Ayreys against the *prima facie* title of the rector, founded on a title set forth in their answer, and the indisputable fact of actual possession, occupation, and pernancy of the tithes. The distinction between a prescription in *non decimando*, and a claim of a portion of tithes, was an essential distinction. A prescription in *non decimando* was simply unlawful; no such prescription could be maintained. If no tithes had been paid, a title founded upon mere non-payment was simply a prescription in *non decimando*. Evidence of length of possession the Court could pay no regard to, for the possession must have been unlawful; and the Court

was therefore bound to decree in favour of the common right. No presumption could be admitted to support a mere simple prescription in *non decimando*. If the Court departed from this rule, they overturned the whole law upon the subject. But there was a great difference between a claim founded upon a mere non-payment of tithes, and a claim supported by evidence of actual enjoyment and pertainancy of the tithes. The title was not unlawful: there might have been a good title derived to the party in possession. The title therefore not being simply unlawful, long possession was evidence of the title. The case of *Fanshaw v. Rotheram* stated at the bar, and determined by Lord Northington, appeared to have been mistaken. The ground of that determination seemed to have been, that however doubtful the case stood as to title, there had been long possession. The claim was of a portion of tithes: the parties might have a good title; and it was not right for a court of equity to disturb the possession. The doctrine was good, applied to that or to this case. There was no difference between a lay impropriator and a rector. The lay impropriator becomes, as it were, a spiritual person; he holds it in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector. He agreed with the Lord Ch. B. upon the ground of great length of possession, and the claim being of a portion of tithes, which might be lawful, that the bill ought to be dismissed. The other Barons concurred.

Edwards v.
Lord Vernon,
Gwill. 1177.

104. On a bill brought by a spiritual rector for tithes, the defendant set up a title to the tithes under family settlements, and possession for 171 years, as a lay fee. Barons Eyre, Hotham, and Perryn thought the case of *Scott v. Ayrey* was determined on right grounds; that a court of equity ought not to assist

against long possession : and that case having been acquiesced in, they thought they ought to dismiss the bill.

105. A bill was filed in the Court of Chancery by John Strutt, as patron in fee of a rectory, and as lessee for years of all the tithes under the rector, presented by him, against Baker, an occupier of lands in the manor of Graces in that parish, and Sir B. Bridges, lord of the manor and owner of the lands. The object of the bill was to establish the right of the rector to the tithes, and for an account. The answer of Baker stated, that by ancient and immemorial usage within the manor of Graces, or by other lawful ways and means, the lands in his occupation had been exempted from payment of tithes to the rector, in the proportion of two thirds of all the tithes, and that the lord of the manor was entitled to those two thirds. The defendants then deduced their title from 37 Hen. VIII. The rector had never received more than one third of the tithes ; the lord of the manor received the other two thirds ; and let some farms with the two thirds of the tithes : other leases were made expressly subject only to one third of the tithes to the rector.

Strutt v.
Baker, 2 Ves.
Jun. 625.

It was contended on the part of the plaintiffs, that the defence, though stated informally, was simply a prescription *de non decimando* in a *que estate*. There could not be such a prescription. If they claimed a portion of the tithes, that must be derived under a title from an ecclesiastical person ; and they could not so claim, having made their defence upon the ground of a lay fee in the lord.

For the defendants it was said, that the defence was stated inartificially : it was not meant to state an exemption from tithes ; but an exemption from paying to the rector ; because that portion belonged to

ante.

the lord. It happened that the same family who had the tithes, had the manor; but it was not asserted that the lord took them in that character. It was so substantially stated, that the Court would leave the plaintiffs to law, according to the late uniform practice of that Court, and the Court of Exchequer. Where there had been an actual pernanacy of the profits, by lay hands, under conveyances as lay property, for a great while; the Court would not, by equitable aid, disturb such a possession, which might have a lawful commencement; and cited the cases of *Fanshaw v. Rotheram*, *Scott v. Ayrey*, and *Edwards v. Lord Vernon*.

Lord Loughborough said—The defence was very fairly to be collected from the answer, which had set out all the facts that constituted the defence; and put the plaintiff into possession of all the case he was to meet. It stated different instruments, family conveyances, purchases, securities made, and recoveries; and wherever it was necessary to describe specifically the things which passed, as upon the recovery in the writ of entry, upon which the fine to the Crown is taken, the two thirds of the tithes were particularly mentioned. He said he was glad to have been furnished with the authorities in which the Courts of Chancery and Exchequer had refused to aid, against a long possession, accompanied with family deeds and purchases, any inquiry into the right by which tithes were held. Courts of equity had no jurisdiction to affect purchasers. In the course of this long period, during which no tithes had been paid to the rector, beyond a third part, there must have been many purchases; and Lord Northington laid particular stress upon that. Why was a court of equity to interfere to destroy a title, acquired under a purchase for a

valuable consideration? In *Scott v. Ayrey* there was an actual occupation of the tithes: what was the evidence here? In some of the leases the lands were described expressly as subject to one third to the rector; in others, the farm was let, and the two thirds of the tithes were particularly specified as demised. On the other hand, when the lessee entered, he did not merely retain, he paid tithes; for he paid a thirtieth instead of a tenth, and that was clearly an ouster *quoad* the two thirds retained. It was full notice to all succeeding rectors, that it was not by fraud or subtraction, but an assertion of right, in opposition to that of the rector; and a clear adverse possession, strongly manifested, by paying only one thirtieth instead of one tenth. Therefore the difference was only in words between this case, and that of *Scott v. Ayrey*. The manner in which the owner had exercised his right was, by demising the land, and the tithes of the land, to the same person, and receiving an accumulated sum, both for the tithe and the land. It was not necessary to enter into the discussion of the title; he could conceive a clear ground; the tradition of the parish showed it. Was it necessary to put the subjects of this kingdom to account for their tithes antecedent to the reign of Henry VIII.? If so, it was not for a court of equity to put them under that inquisition. Therefore he was perfectly warranted in following precedents so very respectable. The bill was dismissed, with costs.

106. Where there has been an uninterrupted possession of a portion of tithes for 250 years, which formerly belonged to an ecclesiastical corporation, a conveyance of them will be presumed.

107. An action was brought to recover a deposit made by the plaintiff upon his bidding for the manor

Oxenden v. Skinner,

Trin. 1798.
Gwill. 1513.

of Elham, and lands at Elham, in Kent, of which 549 acres were represented, by the particular of sale, to be tithe-free, or rather that the vendor was entitled to the tithes of those lands. An objection was made to the title of the vendor to the tithes; as to which the facts were these:—The priory of Rochester was entitled to a portion of the tithes of the lands sold: King Henry VIII. granted them to the dean and chapter of Rochester, but they never had possession of them; nor had any tithe been ever paid of the lands in question, except a modus of 20s. to the vicar. The title to the manor was derived from Sir Charles Herbert, to whom it had been granted in fee simple by King James I.

On the part of the plaintiff it was insisted, that here was no pretence of an exemption from payment of tithes. That the title to them was in the dean and chapter of Rochester; and that if a grant from them was to be presumed, the tithes were not conveyed by later deeds, for want of express words, and therefore were in the Crown, or in the heirs of Sir Charles Herbert. On the part of the defendants, it was admitted that this was not an exemption. But it was said that from a possession of 250 years, a conveyance from the dean and chapter of Rochester prior to 13 Eliz. would be presumed; and that the general words were sufficient to convey the tithes, as profits of the lands.

Lord Kenyon, before whom the abstract and all the opinions taken on both sides had been laid, said, —“ All objections are admitted to be removed, except that which relates to the tithes: a court of equity, in these cases, has a discretion which I, sitting here, cannot exercise; as I am bound to tell the jury that the plaintiff cannot recover his deposit, if there be a good title to these tithes; and on all the circum-

stances, I think there is such good title. Here is possession of them, for 250 years. Who can disturb the title? The rector cannot. These tithes have been severed from the rectory ever since the Conquest. If these tithes had been part of the rectorial tithes, no time would have barred the rector. Where is there any other right? The dean and chapter of Rochester might before the 13 Eliz. have alienated them. I am very clear, that on a possession of two centuries and a half, I must tell the jury that they should presume any conveyance from the dean and chapter."

The plaintiff was nonsuited.

TITLE XXIII.

COMMON.

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|--|---|
| 1. <i>Nature of.</i> | 43. <i>Common may be apportioned.</i> |
| 2. <i>Common of Pasture.</i> | 48. <i>Rights of the Lord. ;</i> |
| 3. <i>Appendant.</i> | 55. <i>Rights of the Commoners.</i> |
| 11. <i>Appurtenant.</i> | 62. <i>Approvement of Commons.</i> |
| 16. <i>Because of Vicinage.</i> | 83. <i>Inclosure of Commons.</i> |
| 20. <i>In Gross.</i> | 86. <i>Extinguishment of Com-</i>
<i>mons.</i> |
| 23. <i>Stinted Commons.</i> | 87. <i>By Release.</i> |
| 26. <i>Common of Estovers.</i> | 88. <i>By Unity of Possession.</i> |
| 33. <i>Common of Turbary.</i> | 96. <i>By Severance.</i> |
| 37. <i>Common of Piscary.</i> | 97. <i>By Enfranchisement of Copy-</i>
<i>holds.</i> |
| 38. <i>Common annexed to Copyholds.</i> | |
| 42. <i>A Right to Common cannot</i>
<i>be devested.</i> | |

SECTION 1.

Nature of.

COMMON is a right or privilege which one or more persons have, to take or use some part or portion of that which another person's lands, waters, woods, &c. produce. It is a right which commenced in some agreement between the lords of manors and their tenants, for valuable purposes ; and being continued by usage, is good, though there be no deed or instrument in writing to prove the original grant.

Common of
Pasture.

1 Inst. 122 a.

2. The most general and valuable kind of common is that of pasture ; which is a right of feeding one's beasts in another's land ; for in those waste grounds which are called commons, the property of the soil is generally in the lord of the manor. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

3. Common appendant, is a right annexed to the Appendant.
possession of land, by which the owner of such land
is entitled to feed his beasts on the wastes of the
manor. The origin of which is thus described by
Lord Coke.

4. "When a lord of a manor, wherein was great 2 Inst. 85.
waste grounds, did enfeoff others of some parcels of 4 Rep. 37 a.
arable land, the feoffees, *ad manutendum servitium*
socæ, should have common in the said wastes of the
lord, for two causes; first, as incident to the feoff-
ment; for the feoffee could not plough and manure
his ground without beasts, and they could not be
sustained without pasture; and by consequence the
tenant should have common in the wastes of the lord
for his beasts, which do plough and manure his te-
nancy, as appendant to his tenancy; and this was
the beginning of common appendant. The second
reason was for maintenance and advancement of
agriculture and tillage, which was much favoured
in law."

5. Common appendant must be time out of mind, 1 Roll. Ab:
396.
and can only be claimed by prescription; so that it
cannot be pleaded by way of custom. Thus where a
person alleged a custom, that every inhabitant of a
certain town had common of pasture in a particular Gateward's
Case,
6 Rep. 59.
place; it was resolved that such custom was against
law, and therefore void.

6. Common appendant is regularly annexed to
arable land only; yet it may be claimed as appendant
to a manor, farm, or carve of land, though it contain
pasture, meadow, and wood; for it will be presumed
to have all been originally arable: but a prescription
to have common appendant to a house, meadow, or
pasture, is void.

Emerson
v. Selby,
2 Ld. Raym.
1015.

7. Common of pasture may be appendant to a cottage, for a cottage has at least a curtilage annexed to it; nor is it deemed in law to be a cottage, unless there are four acres of land belonging to it.

Hollinshead
v. Walton,
7 East, 485.

8. It was resolved by the Court of King's Bench, in a modern case, that the owner of a tenement may have two distinct rights of common for his cattle, upon different wastes, in different manors, under several lords: though it might be otherwise if the different wastes had appeared to have been originally held under the same lord.

1 Inst. 122 a.

9. Common appendant can only be claimed for such cattle as are necessary to tillage; as horses and oxen to plough the land; and cows and sheep to manure it.

1 Roll. Ab.
397-8.
Bennet
v. Reeve,
4 Vin. Ab.
583.
Willes R.
227.
Benson v.
Chester,
8 Term R.
396.

10. Common appendant may by usage be limited to any certain number of cattle: but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land, to which the right of common is appendant: and the number of cattle which are allowed to be *levant* and *couchant*, shall be ascertained by the number of cattle which can be maintained on the land during the winter.

Appurtenant.

11. Common appurtenant does not arise from any connexion of tenure, but must be claimed by grant or prescription; and may be annexed to lands lying in different manors from those in which it is claimed.

1 Roll. Ab.
399.

This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be

claimed on account of ancient arable land. It may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, &c.

12. Common appurtenant may be for cattle without number, or for a certain number only; and may be appurtenant to a manor by prescription, or by grant, made since time of memory; and that as well for a certain number of cattle, as without number: where it is without number, it is restrained to cattle *levant* and *couchant* on the land to which it is annexed. Therefore, if a person claims common by prescription on the land of another, for all manner of commonable cattle, as belonging to a tenement, this is a void prescription; because he does not say that it is for cattle *levant* and *couchant* on the land.

Fitz. N. B.
180. n.

1 Roll. Ab.
398.

Stevens v.
Austin,
2 Mod. 185.

13. It has been determined in a modern case, that common for cattle *levant* and *couchant*, cannot be claimed by prescription, as appurtenant to a house, without any curtilage or land. And Mr. Justice Buller said, the only question was, what was meant in former cases by the words *messuage* and *cottage*, annexed to which was the right of common claimed; for in all of them, the Court said, they would intend that land was included therein. And that it was necessary there should be some land annexed to the house, was clear, from considering what was meant by *levancy* and *couchancy*: it meant the possession of such land as would keep the cattle claimed to be commoned, during the winter; and as many as the land would maintain during the winter, so many should be said to be *levant* and *couchant*.

Scholes v.
Hargreaves,
5 Term R.
46.

14. Persons entitled to common appendant or appurtenant, cannot in general use the common but with their own cattle. If, however, they take the

1 Roll. Ab.
398.

cattle of a stranger, and keep them on their own land, being there *levant* and *couchant*, they may use the common with such cattle; for they have a special property in them.

Drury
v. Kent,
Cro. Ja. 14.
W. Jones,
375.

15. Common appendant or appurtenant for all beasts *levant* and *couchant*, cannot be granted over; but common appurtenant for a limited number of beasts may be granted over: and it is said, that in a case of this kind, the commoner may grant over part of the right of common, and reserve the rest to himself.

Because of
Vicinage.
1 Inst. 122 a.

16. Common because of vicinage is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This species of common is in fact only a permissive right, intended to excuse what in strictness is a trespass in both; and to prevent a multiplicity of suits: it can only exist between two townships or manors adjoining one another; not where there is intermediate land.

11 Mod. 72.

4 Rep. 38 a.

17. Common because of vicinage, is not common appendant; but inasmuch as it ought to be by prescription, from time immemorial, as common appendant, it is in this respect similar to that species of common.

1 Inst. 122 a.

18. This right of common does not authorize an inhabitant of one township or manor to put his cattle upon the wastes of the other township or manor: but he must put them upon the wastes of his own township or manor, from whence they may escape into the wastes of the other.

Corbet's
Case,
7 Rep. 5.

19. Common because of vicinage can only be used by cattle *levant* and *couchant* upon the lands to

which such right of common is annexed : and if the commons of the towns of A. and B. are adjoining, and there are 50 acres of common in the town of A. and 100 acres in the town of B., the inhabitants of the town of A. cannot put more cattle on their common than it will feed ; without any respect to the extent of the common in the town of B., *nec è converso*.

20. Common in gross, is a right which must be claimed by deed, or prescription, and has no relation to land, but is annexed to a man's person : it may be either for a certain, or for an indefinite number of cattle. In Gross.
1 Inst. 122 a.

21. Neither common appendant, nor common appurtenant for cattle *levant* and *couchant*, can be turned into common in gross : but common appurtenant, for a limited number of cattle, may be granted over ; and by such grant, becomes common in gross. 1 Roll. Ab.
401-2.

22. Where a person has common in gross, either for a certain or for an indefinite number of cattle, he may put in the cattle of a stranger, and use the common with them. Idem.

23. In many cases the right to common of pasture is confined to a particular part of the year only ; as from Michaelmas to Lady-day ; in which case it is called a stinted common. So a person may have a right of common in a meadow, after the hay is carried, till Candlemas ; or to common in a pasture, from the feast of St. Augustin till All Saints. Stinted Commons.
1 Roll. Ab.
397.

24. In a case where a man prescribed to have common appendant, namely, if the land was sown by consent of the commoner, then he was to have no common till the corn was cut, and then to have common again till the land was sown by the like consent of the commoner : it was objected that this pre- Hawkes v.
Molyneux,
1 Leon. 73.

scription was against common right, for it was to prevent a man from sowing his own land, without the leave of another. The whole Court held the prescription good; for the owner of the land could not plow and sow it, where another had the benefit of the common; but in this case both parties had a benefit, for each of them had a qualified interest in the land.

25. By the statute 13 Geo. III. c. 81. § 16, 17, 18, it is enacted, that assessments may be made for the improvement of such commons; that the time of opening and shutting them may be varied by the major part, in number and value, of the owners and occupiers, with the consent of the lord or lady of the manor; and that commons which were formerly open during the whole year, may be shut and unstocked for a time, reserving a portion for such of the commoners as may dissent.

Common of Estovers.

26. Common of estovers, is a right of taking necessary housebote, ploughbote, and hedgebote, in another person's woods or hedges, without waiting for any assignment thereof.

Tit. 3 & 8.

27. We have seen that every tenant for life or years has a liberty of this kind, of common right, in the lands which he holds for these estates, without any express provision of the parties; but this right may also be appendant or appurtenant to a messuage or dwelling-house, by prescription or grant, to be exercised in lands not occupied by the tenant of the house: as if a man grants estovers to another, for the repair of a certain house; they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers.

Arundel v. Steer, Cro. Ja. 25.

28. A person prescribed to have estovers for repairing houses, or for building new houses on the land. It was alleged, that the custom was unreason-

able, to take estovers for the building of new houses : but all the Court, except Williams, held it to be a good prescription ; for one might grant such estovers at that day. Williams held the prescription bad, as it ought only to be for repair of ancient houses.

29. Where a person has common of estovers in a 5 Rep. 25 a. certain wood of another, by view and delivery of the owner's bailiff; if he takes estovers without such view and delivery, he is a trespasser, though he takes less than he was entitled to.

30. Where a person has common of estovers, either 4 Rep. 87 a. by grant or prescription, annexed to his house; though he should alter the rooms or chambers, or build new chimnies, or add to the house, the prescription will continue : but he cannot employ any of the estovers in the parts newly added.

31. If a person has common of estovers, and the owner of the soil cuts down part of the wood, the person entitled to estovers cannot take any part of the timber thus cut down ; but must take his estovers out of the residue. Cro. Eliz. 820. Cro. Ja. 256.

32. Where a person has common of estovers appurtenant to a house, and he grants the estovers to another, reserving the house to himself; or grants the house to another, reserving the estovers to himself; in either of those cases, the estovers shall not be severed from the house, because they must be spent on the house. Plowd. 381.

33. Common of turbary, is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appendant to a house, not to land; for turfs are to be burned in a house : nor can it extend to a right to dig turf for sale. Common of Turbary.

34. In an action of trespass, *quare clausum fregit*, Valentine v. Penny, Noy, 145. *et solum fodit*, the defendant justified that he and his

ancestors, and all those whose estate he had in a certain cottage, had used to have common of turbary to dig and sell *ad libitum*, as belonging to the said cottage. Adjudged that this was a bad plea, such a right of common being repugnant in itself; for a common appertaining to a house, ought to be spent in the house, and not sold abroad. Judgement accordingly.

Wilson v.
Willis,
7 East, 121.

35. In a modern case, a custom was pleaded in the manor of Hampstead for all the customary tenants, having gardens, to dig turf on the waste, for making grass-plots, at all times of the year, and as often, and in such quantity as occasion required. The Court of King's Bench held that such a custom was bad in law, as being indefinite, uncertain, and destructive of the common.

Solme v.
Bullock,
3 Lev. 165.

36. Where common of turbary is appurtenant to a house, it will pass by a grant of such house with the appurtenances.

Common of
Piscary.
1 Inst. 122 a.

37. Common of piscary is a right to fish in the soil of another; or in a river running through another's land. And Lord Coke says, that this kind of right does not exclude the owner of the soil from fishing.

Vide Tit. 27.

Common
annexed to
Copyholds.

38. Copyholders are not entitled by general custom to common, on the wastes of the manor of which their estates are held. But copyholders in fee or for life, may, by particular custom, have common on the demesnes of the manor.

6 Rep. 60 b.

Foiston's
Case,
4 Rep. 31 b.
6 Rep. 60 b.

39. A copyholder of certain tenements, called Collins, in pleading alleged a custom, that all the tenants of the said tenements called Collins, had used to have common in such a place, parcel of the said manor; and if the custom might be alleged within the manor, and applied to but one single copyhold, was demurred in law.

Adjudged, that such custom, as well for the form as for the matter of it, was good. For first, the copyholder, in his own name, could not prescribe, for the weakness of his estate ; but if he could prescribe, he ought to do it in the name of the lord of the manor ; to say, that the lord of the manor, and all his ancestors, and all those whose estate he had, had common in such a place, for him and his tenants at will ; and that shall serve where the copyholder claimed common or other profits in the soil of a stranger. But when the copyholder claimed common or other profit in the lord's soil, he could not prescribe in the name of the lord ; for the lord could not prescribe to have common or other profit in his own soil : but then the copyholder must of necessity allege, that within the manor was such a custom, as in this case.

40. Where copyholders for life, according to the custom, have used to have common in the wastes of the lord of the manor, or estovers in his woods, or any other profit *apprender* in any part of the manor ; and afterwards the lord aliens the waste or woods to another in fee ; if the lord grants copyholds for lives, the grantees will be entitled to common of pasture, or common of estovers, notwithstanding the severance : for the title of the copyholder is paramount to the severance, and the custom unites the common or estovers, which are but accessaries or incidents, as long as the lands, being the principal, are maintained by the custom ; and these customary appurtenances are not derived from the estate of the lord, for he is the owner of the freehold and inheritance of the manor, but they are appertaining to the customary estate of the copyholder, after the grant made to him, which is preserved by the custom, and is paramount to the severance.

Swayne's
Case,
8 Rep. 63.

Worledge v.
Kingwell,
Cro. Eliz.
794.

41. If a copyhold, to which common belonged, escheats, and the lord regrants it with all common appendant, the grantee shall have common; for although the ancient common be extinct, yet there was a new grant.

A Right to
Common
cannot be
divested.
5 Rep. 124 a.

42. A right to common being incorporeal, and collateral to the land, cannot be divested. For though a person entitled to a right of common be not in the actual enjoyment of it, yet by *non user* only for a time, he does not cease to have a vested estate or interest therein.

Common
may be
apportioned.
Tyrringham's
Case,
4 Rep. 36.

43. Common of pasture, where it is appendant, may be apportioned; because it is of common right. Therefore, if the commoner purchases part of the land in which he has a right of common, the common shall be apportioned; as if the lord purchases a parcel of the tenancy, the rent shall be apportioned. So if A. has common appendant to 20 acres of land, and enfeoffs B. of part thereof, the common will be apportioned; and B. shall have common *pro rata*. In such case no prejudice is done to the tenant of the land where the common is to be had; for he will not be charged with more, upon the whole, than he was before the severance.

Idem.
1 Inst. 122 a.

44. In the case of common appurtenant, if the person entitled to it purchases part of the land, wherein the common is to be had, there shall be no apportionment; because common appurtenant is against common right. But this kind of common shall be apportioned by alienation of part of the land to which it is appurtenant.

Wild's Case,
8 Rep. 78.

45. One Wild being seised of a messuage and 40 acres of land at Croydon, to which a right of common of pasture was appurtenant, on 200 acres of land at Norwood, for all commonable cattle *levant* and

couchant on the said messuage and 40 acres of land ; enfeoffed John Wood of five acres thereof. The question was, whether Wood was entitled to common appurtenant to his five acres. It was resolved that he was ; and that the alienation of part of the land should not destroy the right of common, either of the alienor or alienee, but each should retain a right of common proportioned to his estate.

46. It was held in the same case, that if a person having a right of common appurtenant to his land, leases part of it, the lessee shall have common for beasts *levant and couchant* on the land.

47. Common of estovers or piscary cannot be ^{1 Inst. 164 a.} apportioned ; and Lord Coke says, if a person has housebote, haybote, &c. appendant to his freehold, they are so entire, that they shall not be divided.

48. With respect to the several rights of the lord ^{Rights of the Lord.} or owner of the soil, and the commoners, it is settled, that the lord of the manor, or other owner of the soil, in which there is a right of common, has the freehold and inheritance in him, and may exercise every act of ownership which is not destructive of the rights of the commoners. Therefore, if a person ^{1 Inst. 122 a.} claims by prescription any manner of common in another's land, and that the owner shall be excluded from having pasture, estovers, or the like therein ; this is a prescription against law ; as contrary to the nature of common : it being implied in the first grant, that the owner of the soil should take his reasonable profit there. But a person may prescribe or allege ^{2 Roll. Ab. 267.} a custom to have and enjoy *solam vesturam*, from such a day to such a day : whereby the owner of the soil shall be excluded to pasture his cattle there at that time.

Hoskins v.
Robins,
2 Saund. 324.
Vide 1 Saund.
353. n. 2.

49. In a case which arose in 23 Cha. II. it was resolved, that the copyholders of a manor may have the sole and several pasture, for the whole year, in the lord's soil; as belonging to their customary tenements: for this does not exclude the lord from all the profits of the land, as he is entitled to the mines, quarries, and trees.

5 Term R.
416.

50. It is laid down by Mr. Justice Buller, that where there are two distinct rights, claimed by different parties, which encroach on each other, in the enjoyment of them; the question is, which of the two rights is subservient to the other. It may be either the lord's right, which is subservient to the commoners; or the commoners, which is subservient to the lord's. In general the lord's is the superior right, because the property of the soil is in him; but if the custom show that it is subservient to the commoners, then he cannot use the common beyond that extent.

Smith v.
Feverell,
2 Mod. 6.

51. The lord by prescription may agist the cattle of a stranger on the common; but not otherwise. And in 27 Cha. II. it appears to have been held, that a licence from the lord to a stranger, to put his cattle upon the common, was good; provided there was sufficient common left for the commoners.

— v.
Palmer,
5 Vin. Ab. 7.

52. On an application to the Court of Chancery, by the tenants of a manor, for an injunction against the lessee of the manor, to stay his digging of brick earth, and making bricks on the common; Lord King, assisted by Sir Joseph Jekyll, denied the motion; for that the lord was of common right entitled to the soil of the waste; and the tenants had only a right to take the herbage by the mouths of their cattle. That the lord had a right to open mines in

the waste of a manor, and why not to dig brick earth ; especially where the bricks were made for one of the tenants of the manor, and to be employed in building upon the manor.

53. A lord of a manor may dig clay-pits on the common, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right has always been exercised by the lord.

54. A commoner brought an action against the *Bateman v. Greene,* lessees of the lord, for digging clay upon the common. *5 Term R. 411.* It appeared that the herbage of the common was in

many places destroyed by this practice : but it also appeared that clay had been dug by the lord on the common, for 70 years preceding, and had been sold by him during that time.

The jury found a verdict for the plaintiff ; but a new trial was granted. Lord Kenyon said, the only question was, whether the evidence supported the verdict for the plaintiff ; and he was clearly of opinion that it did not. It appeared that a few acres of the common had been rendered unproductive to the commoner ; but the right of digging for clay in the common was incontestibly proved to have existed at all times in the lord ; and no witness had stated in what respect this right had been more exercised latterly, than formerly. That such a right, as the lord had here exercised, might exist in point of law, could not be doubted : for if the lord had always dug on the common, and taken what clay he pleased, without interruption or complaint ; and nothing appeared to show that this right was limited to any particular extent ; there was no pretence for subjecting him, or those who claimed under him, to such an action ; though the commoners had been abridged of their enjoyment of some part of the common.

*Rights of
Commoners.*
1 Roll. Ab.
406.

55. With respect to the rights of commoners, it is settled, that in cases of common of pasture they have nothing to do with the soil, but only a right to take the grass, with the mouths of their cattle. It has therefore been held, that a commoner cannot make a trench or ditch on the common, to let off the water ; unless there is a custom to authorize him.

*Bellew v.
Langdon,
Cro. Eliz.*
376.

56. Rabbits being considered as beasts of warren, a commoner cannot justify the killing or driving them away, for they are not vermin ; therefore the keeping of them by the owner of the soil is lawful.

*Hadesdon
v. Grussell,
Cro. Ja.* 195.

57. If the lord makes rabbit-burrows in the common, and stores them with rabbits, the commoners cannot justify killing them ; for a commoner has nothing to do with the land, but to put in his cattle ; and he may not meddle with any thing of the lord's there. The commoner may however have an action on the case, if the lord leaves not sufficient common.

2 Leon. 201.
203.
Yelv. 104.

*Cooper v.
Marshall,*
1 Burr. 259.

58. A commoner cannot fill up rabbit burrows made by the lord in the common ; but if his rights are injured by them, his remedy is by action.

*Kirby v.
Sadgrove,*
1 Bos. & Pul.
13.

59. It has been held, in a modern case, that if the lord of the manor plants trees on his common, a commoner has no right to abate them.

1 Burr. 265.

60. It is said by Lord Mansfield, that the lord, by his grant of common, gives every thing incident to the enjoyment of it, as ingress, egress, &c. ; and thereby authorizes the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground ; because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoner's cattle out, is therefore inconsistent with a grant, which gives them a right to enter.

61. In all instances of this kind, the commoner has a right to abate : and in a case where the lord brought an action of trespass, for pulling down hedges, the defendant pleaded that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy it as fully as before : the Court was of opinion that the defendant might abate the hedges ; for thereby he did not meddle with the soil, but only pulled down the erection.

Mason
v. Caesar,
2 Mod. 66.

62. By the common law, a lord of a manor could not appropriate to himself, by inclosure or otherwise, any part of his wastes, in which his tenants enjoyed a right of common ; because the common issued out of the whole and every part thereof.

Approvement
of Commons.
2 Inst. 85.

63. This inconvenience produced an article in the statute of Merton, 20 Hen. III. c. 4., by which it was enacted, that when any of the tenants of a manor brought an assise of *novel disseisin* for their common of pasture, and it was therein recognized by the justices that they had as much pasture as sufficed to their tenements, together with free egress and regress from their tenements unto the pasture, they should be contented therewith ; and they of whom it was complained should go quit of as much as they had made their profit of their lands, wastes, woods, and pastures. If they alleged that they had not sufficient pasture, or sufficient ingress and egress, according to their hold, the truth thereof was to be inquired into by the assise ; if it was found as alleged, they were to recover their seisin by view of the inquest, and the disseisors were to be amerced as in other cases.

Idem.

64. This statute extended only to common appendant ; but by the statute of Westminster 2. c. 46. it was enacted, that the statute of Merton should bind

2 Inst. 473.

neighbours, and such as claimed common of pasture, appurtenant to their tenements; but not such as claimed common by special grant or feoffment, for a certain number, or otherwise.

Idem, 474.

65. Lord Coke observes, that the word *vicinus* in this act is taken for a neighbour, though he dwell in another town, so as the towns and commons be adjoining to each other; and if the lord has common in the tenant's ground, the tenant may approve within this act, for there the lord is *vicinus*.

2 Inst. 476.

66. The statute of Westminster 2. also provides, that, by occasion of windmills, sheepcotes, dairies, enlarging of a court, necessary curtilage, none shall be grieved by assize of *novel disseisin* for common of pasture. And Lord Coke observes, that here are five kinds of improvement expressed, that, both between lord and tenant, and neighbour and neighbour, may be done without leaving sufficient common to them that have it; any thing either herein or in the statute of Merton to the contrary notwithstanding; and these five are put but for examples; for the lord may erect a house for the dwelling of a beast-keeper, and yet it is not within the letter of the law.

Idem.

67. Lord Coke also observes on the words, necessary curtilage, that they shall not be taken according to the quantity of freehold the lord has there, but according to his person, estate, or degree, and for his necessary dwelling and abode; for if he have no freehold in that town, but his house only, yet may he make a necessary enlargement of his curtilage.

Nevill v.
Hamerton,
Sid. 79.

68. In a subsequent case it was held, that the lord cannot by the statute of Merton erect a house, unless it be for his own habitation or that of his shepherd; and he must allege that he built it for one of these purposes: otherwise he might build a great house to

let to a nobleman, which might require a greater curtilage than the lord's or his herdsman's.

69. The words of the statute of Merton are, *pastura et communia pasturæ*, so that it does not extend to common of turbary, estovers, piscary, or the like. And in a modern case it was held, that the lord of a manor has no right, under the statute of Merton, to inclose and approve the wastes of a manor, where the tenants have a right to dig gravel on the waste, or to take estovers there.

2 Inst. 87.
Grant v. Gunner,
1 Taunt. 435.
Duberly
v. Page,
2 Term R. 39.

70. By the statute 3 & 4 Edw. VI. c. 3. the statutes of Merton and Westminster are confirmed; and it is further enacted, that where judgement is given for the plaintiffs, in an assize, upon any branch of these statutes, the Court shall award treble damages.

71. It was formerly doubted whether, in the case of a common appurtenant without number, the lord might approve; for not being admeasurable, it was not approveable, because the common being without number, sufficiency could not be proved. Dyer and Manwood held, that although the common were without number, yet it might be reduced to a certainty, being by prescription; as the number of cattle which the best and most substantial tenant of the said tenement, at any time within the memory of man, had kept upon the waste; and then the lord might approve, leaving sufficient common according to such rate.

Anon. 4.
Leon. 41.

72. In the case of common because of vicinage, one may inclose against the other; and in 27 Eliz. it was resolved, where two lords of two several manors had two wastes, adjoining parcels of their manors, without inclosure, but the bounds of each were well known, in which wastes the tenants of each manor

1 Inst. 122 a.
Smith v. How,
4 Rep. 38 b.

had reciprocally common because of vicinage, that one might inclose against the other.

Fawcett v. Strickland,
Com. Rep.
577.
6 Term R.
747.

73. It is laid down by Lord Chief Justice Willes, and the other Judges of the Court of Common Pleas, that although a lord of a manor cannot, by virtue of the statute of Merton, inclose and improve against common of turbary; yet that where there is common of pasture and common of turbary, in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture; for they are two distinct rights.

2 Term Rep.
391, 392. n.

74. Although the custom of a manor authorises the commoners to inclose a part of the waste, under certain circumstances, yet this does not take away the lord's right of approving, under the statute of Merton; provided he leave sufficient common for the tenants.

Clarkson v. Woodhouse,
5 Term R.
412. n.

75. In a modern case, the Court of King's Bench held that a custom, authorizing the owners of ancient messuages within a manor, to have certain portions of the common called moss dales assigned to them in severalty, for digging turves, and after clearing them of turves, to approve them, and hold them in severalty, discharged from all right of common, was good in law.

Folkard v. Hemmett,
5 Term R.
417. n.

76. In another modern case, it was held by the same Court, that the lord may, with the consent of the homage, grant part of the soil of the common for building, if such a right has been immemorially exercised.

Shakespeare v. Peppin,
6 Term R.
741.

77. Where commoners have some other right on the common, beside that of pasture, as of digging sand, &c. the lord may notwithstanding approve, if he leave sufficient common of pasture: and if such inclosure be no interruption to the enjoyment of the

other kind of common. It was, however, laid down in a modern case, that there can be no approver in derogation of a right of common of turbary.

Grant v.
Gunner,
1 Taunt. 435.

78. Although the statutes of Merton and Westminster speak of the lords of manors, as the only persons enabled to approve of commons, yet it has been held, in a modern case, that any person who is seised in fee of a waste within a manor, may approve, leaving a sufficiency of common; for otherwise not half the wastes in the kingdom could be approved; as many of the places that are called manors, would not be found such in point of law, if the matter were strictly examined. And Lord Kenyon observed, that though in the statutes of Merton and Westminster 2, only the lord is mentioned, yet in those days there was a paucity of expression in acts of parliament; for the lord of the manor is put as the owner of the soil, where they stand in the same predicament. And a contrary decision would be ruinous indeed, and extremely prejudicial to the public.

Glover v.
Lane,
3 Term R.
445.

79. The Court of Chancery will assist and protect a lord of a manor, in approving a common under the statute of Merton.

80. There having been an inclosure made out of a common, with young wood and timber growing thereon, and the plaintiff insisting that it was an improvement within the statutes of Merton and Westminster 2, the Court thought fit to continue an injunction which had been granted to him, and directed a trial to be had the next assises, whether sufficient common was left for the tenants.

Weekes
v. Slake,
2 Vern. 361.

81. The lord of a manor having inclosed part of a common, and the tenants by force throwing open the inclosures, brought his bill to quiet him in possession;

Arthington
v. Tawkes,
2 Vern. 356.

surmising he had only improved according to the statute of Merton, and had left a sufficiency of common; but that some of the defendants, although they pretended to have a right, were not entitled to intercommon upon the waste in question. Upon the hearing, two issues were directed to be tried at law: 1. As to some of the defendants, whether they had a right of common. 2. Whether there was sufficient common left, beyond what was inclosed. But the injunction was continued in the mean time, although it was a new inclosure, and made not above two years before the bill exhibited.

— v.
Palmer,
5 Vin. Ab. 7.

82. Upon a bill brought in Chancery by the tenants of a manor, against the lessee of the lord, to establish their right of common of pasture, and for an injunction against the defendant, for inclosing part of the common, Lord King, assisted by Sir Joseph Jekyll, denied the motion; for, by the statute of Merton, the lord might inclose part of the waste, leaving sufficient common. That at common law, in an action brought against the lord, the tenant must allege in the declaration, that there is not sufficient common left, or he cannot maintain the action: and if that should be the case, the tenants might have their remedy at common law; and it was too soon for an injunction before answer.

Inclosure of
Commons.

83. The approvement of commons having been found to be extremely beneficial to the public, by increasing tillage and agriculture, it was enacted by the statute 29 Geo. II. c. 36. § 1., that it shall be lawful for his Majesty, his heirs and successors, and all other owners of wastes, woods, and pastures, wherein any persons or bodies politic have right of common of pasture, by and with the assent of the major part in number and value of the owners and occupiers of the tene-

ments to which such right of pasture doth belong ; and to and for the major part, in number and value, of the owners and occupiers of such tenements, by and with the assent of the owner or owners of the said wastes, woods, and pastures ; and to or for any other person or persons, or bodies politic, by and with the assent and grant of the owner or owners of such wastes, woods, and pastures, and the major part in number and value of the owners and occupiers of such tenements, to inclose, for the growth and preservation of timber and underwood, any part of such wastes, woods, and pastures.

84. By the statute 31 Geo. II. c. 41., it is provided, that if any recompence be agreed to be given for such inclosure, it shall be made to the persons interested in the right of common, in proportion to their respective rights, and not to the overseers of the poor, as was directed by the second section of the preceding act. And the powers given to owners by that act may be exercised by tenants for life, or years, during their respective interests ; with a proviso, that nothing done by them shall have effect after the determination of their estates.

85. Commons have frequently, in modern times, been entirely inclosed, and allotted to the persons having rights of common, in proportion to the number of cattle they were entitled to put on the common. But this is usually effected by means of a private act of parliament ; of which an account will be given in a subsequent title. And by the stat. 13 Geo. III. c. 81. § 15., lords of manors, with the consent of three-fourths of the persons having right of common, are enabled to lease for four years, any part of the said commons, not exceeding a twelfth part thereof ; and

to apply the rent in draining, fencing, or otherwise improving the residue of the said wastes.

Extinguishment of Common.

86. A right to common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold.

By Release.
Rotherham v. Green,

87. A right of common may be extinguished by a release of it to the owner of the soil. And it has been determined, that if a commoner releases part of the common, it will operate as an extinguishment of the whole; because the right of common is entire throughout the whole land: therefore, a release of part is a release of the whole.

Cro. Eliz.
593.

By Unity of Possession.

4 Rep. 38 a.

88. Common appendant and appurtenant become extinguished by unity of possession of the land, to which the right of common was annexed, with the land in which the common was; for where a man has as high and perdurable an estate in the land as in the common, there the common becomes extinct.

Bradshaw v. Eyre,
Cro. Eliz.
570.

89. In trespass for breaking his close in Abney, the defendant pleaded, that long before, &c., one Bradshaw was seised of the place where, &c. in fee; that one Fuljamb was seised in fee of a house and 20 acres of land in Abney aforesaid; that the said Fuljamb, and all those whose estate, &c. had common in the said place where, &c. and the said Fuljamb, enfeoffed of the said tenement the said Bradshaw; that afterwards the said Bradshaw let unto the defendant the said house and 20 acres of land, with all commons, profits, and commodities thereto appertaining, or used with the said messuage; and thereby justified putting in his cattle to use the common, &c. Upon demurrer, it was held clearly that this common was extinguished by the unity of possession, and could not be revived again. Gawdy, Just. said it was the same of common appendant.

90. Where the abbot of D. was seised of a common out of the abbey of S., as appurtenant to certain lands of the abbey of D.; afterwards both these abbeys were dissolved, and the possessions of both were given to the King, to hold in as ample a manner as the abbots held them. Afterwards, the King granted the lands of one abbey to A., and those of the other abbey to B. It was determined that the words "in as ample a manner, &c." were to be construed according to law, and no further; and that the unity of possession of the King had extinguished the common.

Nelson's
Case,
3 Leon. 128.

91. To constitute such an unity of possession as will extinguish a right of common, the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration, and all other circumstances of right.

92. A right of common was appendant to certain tenements, which were parcel of the abbey of Sarum, in a common that was parcel of the Duchy of Cornwall. Upon the dissolution of the abbey of Sarum, these tenements became vested in King Henry VIII. in fee, in whom the Duchy of Cornwall was then vested, for want of a Duke of Cornwall. Resolved, by Lord Holt and the rest of the Judges, that this was not such an unity of possession as would destroy the right of common, because King Henry VIII. had not as perdurable an estate in the one as in the other; for in the Duchy of Cornwall the King had only a fee determinable on the birth of a Duke of Cornwall, which was a base fee; but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ*.

Rex v. Her-
mitage,
Carth. 239.

Anon. Godb.
4.

93. A parson had common appendant to his parsonage, in the lands of an abbey; afterwards the abbot had the parsonage appropriated to him and his successors. It was held by Wyndham and Meade, *contra* Dyer, that the abbot had not as perdurable an estate in the one as in the other; for the parsonage might be disappropriated, and then the parson would have the common again.

Dyer, 339.
pl. 45.

94. Where the lord approves a part of the waste, and afterwards one of the commoners purchases the part so approved, this will not extinguish his right of common; because, by the approvement, the land was utterly discharged of common.

ante, § 45.

8 Rep. 79 a.

95. It has been stated, that where a person having common appurtenant, purchases part of the lands wherein the common is to be had; the whole right of common shall be extinct. It has also been held, that where a person having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common.

By Severance.
1 Roll. Ab.
401.

96. Common appendant or appurtenant for cattle *levant* and *couchant*, may also be extinguished by severance. As where a person having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, excepting the common, this creates an extinguishment of the common.

By Enfranchisement of Copyholds,
Tit. 10. c. 6.
Marsham v. Hunter,

97. Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, *cum pertinentiis*; the common is extinguished; because it was annexed to the custo-

chary estate, which being destroyed and converted into a freehold, the right of common is gone. And the words *cum pertinentiis* cannot have the effect of continuing it; because the right of common was not appurtenant to the freehold estate granted by the lord.

Cro. Ja. 253.
Gilb. Ten.
224.

98. This doctrine does not appear to be allowed in equity; for where the lord of a manor enfranchised a copyhold, with all common thereto belonging or appertaining; afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and recovered against him; the Court decreed that he should hold and enjoy the same right of common which belonged to the copyhold.

Styant v.
Walker,
2 Vern. 250.

99. It is said by Lord Holt, that if a copyholder of one manor has common in the wastes of another manor, an enfranchisement of the copyhold does not extinguish the common; for it is a derivative right which the copyholder has. So, if it be taken as appendant to land, enfranchisement will not extinguish it.

6 Mod. 20.

100. A right of common, which has been extinguished by unity of possession, may be revived by a new grant.

Common may
be revived.

101. Thus, in the case of *Bradshaw v. Eyre*, the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said messuage, &c." operated as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common as was used before, yet it was the like common.

ante § 89.

102. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's

Sandys v.
Oliff,
Moo. 467.

Grymes v.
Peacock,
Bulst. 17.

hands; it was held, that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said messuage would have passed such common as the first was.

Sawyer's
Case,
W. Jones,
285.

103. Where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the Crown, with the lands in which the common was; and the Crown granted the lands to which the common belonged, with the words, *Tot, tanta, talia, libertates, privilegia, et franchis, &c. quot, &c. aliquis, &c.* Resolved, that being common in gross, it was not revived; for in that case every person who had any part of those lands should have as great common as the abbot had; and so the common would be infinitely surcharged. But if such common had been appendant or appurtenant, it would have been revived; for no person would have common for more cattle than were proportionable to his land.

Worledge v.
Kingswell,
antc, § 41.

TITLE XXIV.

WAYS.

- | | |
|-------------------------------|-------------------------------------|
| 1. <i>Nature of.</i> | 23. <i>Who are bound to repair.</i> |
| 4. <i>How claimed.</i> | 24. <i>How extinguished.</i> |
| 15. <i>How to be used.</i> | 27. <i>How revived.</i> |
| 22. <i>Cannot be devoted.</i> | |

SECTION 1.

A RIGHT of way is the privilege which an individual, Nature of.
 or a particular description of persons, such as
 the inhabitants of the village of A., or the owners or
 occupiers of the village of B., may have, of going over
 another person's grounds. It is an incorporeal heredi-
 tament of a real nature; entirely different from the
 King's highway, which leads from town to town; and
 also from common ways, which lead from a village
 into fields.

2. There are three kinds of ways. First, a foot- 1 Inst. 56 a.
 way, which is called *iter, quod est, jus cundi vel ambu-*
landi hominis. The second is a footway and horse-
 way, which is called *actus ab agendo*. This is vulgarly
 called a pack and prime way, because it is both a
 footway, and a pack or drift way also. The third is,
via or *aditus*, which contains the other two, and also
 a cartway; for this is *jus cundi, vehendi, et vehiculum*
et jumentum ducendi. This is twofold; namely, *regia*
via, the King's highway for all men; and *communis*
strata, belonging to a city or town, or between
 neighbours and neighbours.

3. Notwithstanding these distinctions, it seems that 1 Vent. 189.
 any of these ways which is common to all the King's 1 Term R. 570.

subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; and that any such cartway may also be called the king's highway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way; because it does not belong to all the king's subjects, but only to the inhabitants of a particular parish, village, or house. And Lord Hale says, that whether it be a highway or not, depends much upon reputation.

How claimed. 4. A right of way over another person's ground may be claimed in three ways. First, by prescription and immemorial usage: as, where the inhabitants of a certain vill, have, time out of mind, traversed a particular close or field, to get to their parish church

Tit. 31. c. 1. 5. So a person may prescribe for a way from his house, through a certain close, to the church; though he himself has lands next adjoining to his house, through which, of necessity, he must first pass. For the general prescription shall be applied only to the lands of others.

Jenk. Cent. 3 Ca. 94. 6. It was held in 18 Edw. IV. that a person may have a right of way to go through a churchyard. And it was said in that case, that the church yard of the Charter House was a common way for the inhabitants of London to St. John's.

6 Mod. R. 3. 7. A person cannot claim a way over another's ground, from one part thereof to another: but he may claim a way over another's ground, from one part of his own ground to another.

8. Secondly, by grant; as where the owner of a piece of ground grants to another the liberty of passing over his grounds in a particular direction;

the grantee thereby acquires a right of way over those grounds.

9. It has been determined in a modern case, that where a person granted to another "a free and convenient way, as well an horseway as a footway, as also for carts, waggons, wains, and other carriages whatsoever, in, through, over, and along a certain slip of land, &c., to carry stone, timber, coal, or other things whatsoever;" the grantee had a right to lay a framed waggon way along the slip of land, for the purpose of carrying coals; it being the most convenient way for transporting them: but that the grantee was not justified in making tranverse roads across the slip of land.

Senhouse v. Christian,
1 Term R.
560.

10. It was held in another modern case, that an uninterrupted enjoyment of a right of way for 20 years, and no evidence that it had been used by leave or favour, or under a mistake, was sufficient to leave to a jury to presume a grant.

Campbell v. Wilson,
3 East. R.
294.

11. Thirdly, a person may claim a right of way over another's land from necessity. As if A. grants a piece of land to B., which is surrounded by land belonging to A.; a right of way over A.'s land passes of necessity to B., for otherwise he could not derive any benefit from his acquisition. And the feoffor shall assign the way where he may best spare it, It is the same if the close aliened be not totally inclosed by the land of the grantor, but partly by the land of strangers; for the grantee cannot go over the stranger's land.

6 Rep. 3.

2 Roll. Ab.
60.

12. In trespass, upon demurrer, the case was, a person sold lands; afterwards the vendee by reason thereof, claimed a way over the plaintiff's land, there being no other convenient way adjoining; and whether this was a lawful claim was the question. It

Clarke v. Cogge,
Cro. Jac. 170.

was resolved, without argument, that the way remained; and that he might well justify the using thereof, because it was a thing of necessity; for otherwise he could not have any profit of his land.

Videl Saund.
Rep. 323. c. 6.

13. It was held in the same case, that if a man hath four closes lying together, and sells three of them, reserving the middle close, and has no way thereto but through one of those which he sold, although he did not reserve any right of way, yet he shall have it, as reserved to him by law.

Howton v.
Treasure
8 Term. 2. 50.

14. In a modern case, it was determined by the Court of King's Bench, that where a person conveys land, merely as a trustee, to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incident to the grant. And Lord Kenyon observed, it was impossible to distinguish this from the general case, where a man grants a close surrounded by his own land, in which case the grantee has a way to it, of necessity, over the land of the grantor; merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee; for it could not be intended that he meant to make a void grant. There being no other way to the defendant's close, but over the land of one of the persons who granted to him, he was entitled to such a way of necessity; upon the authority of all the cases, and the principle that every deed must be taken most strongly against the grantor.

Reignolds
v. Dillow,
Willes R.
282.

How to be
used.

15. A right of way can only be used according to the grant, or the occasion from which it arises; and must not exceed it; therefore, if a person has a right of way over another's close, to a particular place, he cannot justify going beyond that place.

Howell
v. King,
1 Med. 190.

16. In trespass for driving cattle over the plaintiff's ground, the case was,—A. had a way over B.'s ground

to Blackacre, and drove his beasts over B.'s ground to Blackacre, then to another place beyond Blackacre. Upon demurrer, the question was, whether this was lawful or not. It was urged, that when the defendant's beasts were at Blackacre, he might drive them whither he would. On the other side, it was said, that by this means the defendant might purchase 100 or 1,000 acres adjoining to Blackacre, to which he prescribed to have a way, and by that means the plaintiff would lose the benefit of his land: that a prescription presupposed a grant, and ought to be continued according to the intent of its original creation; to which the Court agreed; and judgement was given for the plaintiff.

17. The same point appears to have been determined in a subsequent case, in which Powell, Justice, observed, that the difference was, where the person having a right of way to a particular place, goes farther, to a mill, or a bridge, there it may be good: but when he goes to his own close, it is not good. The editor of the fourth edition of Lord Raymond's Reports, in a note upon this passage, expresses a doubt, whether this distinction be well founded; and says, "The true point to be considered upon such a case should seem to be, *quo animo* the party went to the close; whether really and *bond fide* to do business there, or merely in his way to some distant place." Lawton v. Ward, 1 Ld. Raym. 75.

18. Where a person has a right of way over another's land, and the road is impassable, he may go over any other part of the land.

19. In an action of trespass for destroying his close; the defendant pleaded, that time out of mind there was a common footpath through the close, &c. The plaintiff replied, that the defendant went in other places, out of the way. The defendant rejoined, that

Henn's Case, W. Jones, 296.

the footpath was *adeo luteosa et funderosa*, by default of the plaintiff, who ought to amend it : that he could not pass along ; therefore he went as near the path as he could, in good and passable way : this was resolved to be a good plea and justification.

20. It has however been resolved, in a modern case, that where a person has a right to a precise specific way over another's ground, which he is bound to repair, he cannot deviate from it, even though it should be overflowed by a river.

Taylor v.
Whitehead,
Doug. 745.

21. In trespass for breaking and entering a close, the defendant pleaded a right of way, by prescription, through a lane of the plaintiff's ; that the tenants of the *locus in quo* were bound to repair ; that the lane was overflowed with water, and that he necessarily went over the *locus in quo*. The plaintiff having traversed the prescription to repair, and the right of way, the jury found for the plaintiff, as to the first plea, respecting the repairs, and for the defendant, as to the second plea, respecting the right of way.

The question on the validity of the last plea having been argued, Lord Mansfield said,—“ The question is upon the grant of this way. Now it is not laid to be a grant of a way generally over the land, but of a precise specific way. The grantor says, you may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river ; and, for ought that appears, *that* may have happened by the neglect of the defendants. Highways are governed by a different principle ; they are for the public service ; and if the usual

tract is impassable, it is for the general good that people should be entitled to pass in another line."

Mr. Justice Buller observed, that if this had been a way of necessity, the question would have required consideration, but it was not so pleaded. It did not appear that the defendant had no other road.

Vide 1 Saund.
R. 322. n. 3.

22. A right of way being an incorporeal hereditament, similar in many respects to a right of common, cannot be devested.

Cannot be
devested.
Tit. 23. § 42.
Touch. 23.

23. It seems that, by the common law, where a person granted a right of way over his land to another, the grantee was bound to repair it. But the grantor of a private way may be bound, either by express stipulation, or by prescription, to repair it.

Who are
bound to
repair.
ante, § 21.
Rider v.
Smith,
3 Term R.
766.

24. Where a person has a right of way over another's close, and he purchases such close, his right of way is extinguished by the unity of seisin and possession.

How extin-
guished.
Heigate v.
Williams,
Noy, R. 119.
Surry v. Pigot,
3 Bulst. 340.
Noy, R. 84.

25. There is however a distinction between a right of way which is of necessity, and a right of way which is merely an easement; for in the latter case it is not extinguished by unity of possession.

26. Thus, if a vill has a right of way to a church, and one of the vill purchases the land over which the way is; yet this unity of possession shall not extinguish the way, because it is a thing of necessity.

Jordan v.
Atwood,
1 Roll. Ab.
936.

27. It is said that where a right of way has been extinguished by unity of possession, it may be revived by severance.

How revived.

28. Thus where upon a descent to two daughters, land over which there had been a right of way, was allotted to one of them, and the land to which the right of way belonged, was allotted to the other; it was held that this allotment, without specialty to have the way anciently used, was sufficient to revive it.

Jenk. Cent.
1 Ca. 37.

pl. 15.

29. There is a case similar to this in Brook's Ab. title *Extinguishment*, where it is doubted whether the partition did not create a new right of way. But this doctrine of revival does not seem to have been admitted in the following case.

Whaley v.
Thompson,
1 Bos. & Pul.
371.

30. Thomas Adderley being seised at the same time of two closes, over one of which a right of way had been immemorially used to the other, devised the close to which the right of way had been annexed, with its appurtenances, to A. B., and devised the other close to another person. A. B. claimed the right of way. The Court held, that from the moment when the possession of the two closes was united in one person, all subordinate rights and easements were extinguished. The only point therefore that could possibly be made in the case was, that the ancient right, which existed while the possession was distinct, was merely suspended, and might revive again. It was admitted that the word appurtenances would carry an easement, or legal right; but its operation must be confined to an old existing right; and if the right of way had passed in this instance, it must have passed as a new easement; but the right of way being extinct, the word appurtenances had nothing to operate upon.

Keymer v.
Summers,
Bull. N. P.
74.

31. It is said that though a right of way be extinguished, yet if it is used for thirty years after, this is sufficient to afford a presumption of a new grant or licence from the owner of the land.

TITLE XXV.

OFFICES.

- | | |
|---|--|
| 1. <i>Nature of.</i>
6. <i>How created.</i>
8. <i>Offices incident to others.</i>
11. <i>How Offices may be granted.</i>
16. <i>Bishops, &c. may grant Offices.</i>
21. <i>What Offices may be granted to Two Persons.</i>
26. <i>What Estate may be had in an Office.</i>
41. <i>What Offices may be granted in Reversion.</i>
47. <i>What Offices may be entailed.</i>
50. <i>When subject to Curtesy and Dower.</i> | 53. <i>Some Offices may be assigned.</i>
56. <i>Who may hold Offices.</i>
63. <i>How to be exercised.</i>
71. <i>Qualifications required.</i>
76. <i>Offence of selling or buying Offices.</i>
84. <i>What Offices are not within the Statute.</i>
88. <i>Where Equity will interpose.</i>
91. <i>How Offices may be lost.</i>
92. <i>By Forfeiture.</i>
100. <i>Acceptance of an incompatible Office.</i>
103. <i>Destruction of the Principal.</i> |
|---|--|

SECTION 1.

AN office is a right to exercise a public or private Nature of.
 employment, and to take the fees and emolu-
 ments belonging to it; and all offices relating to land,
 or exercisable within a particular district, are deemed 1 Inst. 20 a.
 incorporeal hereditaments, and classed under the head
 of real property.

2. Offices are either public or private; the first are those which concern the general administration of justice, or the collection of the public revenue. Such as the judges of the King's courts at Westminster, sheriffs, coroners, &c.; the commissioners of the customs and excise, &c. The second are those which only concern particular districts belonging to private individuals, such as stewards and bailiffs of manors.

3. Offices are also either judicial or ministerial; the first relating to the administration of justice, and which must be exercised by persons of sufficient skill and experience in the duties of such offices. The second are those where little more than attention and fidelity are required, to the due discharge of them.

4. Upon the establishment of the feudal law in England, our Kings frequently granted lands, reserving some honorary services, to be done by the grantees and their heirs, to the King himself; such as to carry his banner or his sword, or to be his sewer, carver, or butler, at his coronation. This was called a tenure by grand serjeanty, and the right of performing these services was considered as an office of great honour; of which many still exist, and are claimed to be exercised at every coronation.

Dissert. c. 2.
§ 41-2.

5. There are nine great offices of the crown; and the persons exercising them, who are called the great officers of state, have the titles of Lord High Steward, Lord Chancellor or Keeper of the Great Seal, Lord High Treasurer, Lord President of the Council, Lord Privy Seal, Lord Great Chamberlain, Lord High Constable, Earl Marshal, and Lord High Admiral. The office of High Steward was originally annexed to the manor of Hinckley in Leicestershire, and held in grand serjeanty. The office of High Constable was annexed to certain manors in Gloucestershire. The office of Great Chamberlain was held of the King by grand serjeanty in gross.

Collin's
Claims,
185. 190.

How created.

6. All public offices must originally have been created by the sovereign, as the fountain of government. There are however a great number of offices which, having existed for time out of mind, are therefore said to be derived from immemorial usage.

4 Inst. 75.

7. Lord Coke says—That in consequence of the 2 Inst. 523. statute 34 Edw. I. *De tallagio non imponendo*, the King cannot erect any new office with new fees; for that would be a talliage put upon the subject, which cannot be done without the assent of Parliament. That this appeared by a petition in Parliament 13 Hen. IV. in which the Commons complained that an office was erected for measuring of clothes and canvass, with a fee for the same, by colour of the King's letters patent, and prayed that those letters patent might be revoked; for that the King could erect no offices, with new fees to be taken of the people; who may not be so charged but by Parliament. And that these letters patent were declared void in the Court of K. B., and in Parliament.

8. There are several offices incident to other offices of a superior kind, and grantable by those who hold the superior offices. Thus the Lord Chancellor or Keeper of the Great Seal, and the Chief Justices, have a right of granting several offices in their respective courts. Lord Coke says—The justices of the King's courts did ever appoint their clerks to enrol all pleas pleaded before them; some of whom by prescription grew to be officers in their courts. By the stat. of Westminser 2. c. 30. it was declared, that all justices of the benches should have in their circuits clerks to enrol all pleas, by which this right was confirmed. And the justices of assize have ever since appointed the clerks of assize. Offices incident to others. 2 Inst. 425.

9. It has also been an ancient practice for the sheriffs of counties to appoint the county clerk and gaoler. The *custos rotulorum* appoints the clerk of the peace, cursitors are appointed by the Lord Chancellor, six clerks by the Master of the Rolls, and exigenters and philazers by the Chief Justice of the Common Pleas. 4 Rep. 34 a. Jenk. 216. 4 Mod. 167.

10. There are several ancient offices incident to bishopricks; such as chancellor, commissary, register, &c., which are judicial; and other offices, such as steward, surveyor, park-keeper, &c., which are only ministerial. Where a new bishoprick has been created, the bishop has appointed officers of a similar nature.

How Offices
may be
granted.
4 Inst. 75.

11. Ancient offices must be granted in such form and manner as they have used to be; unless the alteration be by authority of Parliament. Offices held immediately from the Crown must be granted by letters patent, each office must be granted with all its ancient rights and privileges, and every thing incident to it; for if any office incident to that which is granted is reserved, the reservation is void: and it is said by Lord Holt, that a grant of the office of marshal of the King's Bench Prison, to which the office of chamberlain is inseparably incident, with a reservation of the office of chamberlain, was void.

1 Salk. 439.
2 Ld. Raym.
1038.

12. Where an office is incident to another office, such incidental office cannot be granted by the Crown, even though the principal office is vacant at the time.

Mitton's
Case,
4 Rep. 32 b.

13. Queen Elizabeth, by letters patent, granted the office of clerk of the county court of Somersetshire to one Mitton, with all fees, &c. Afterwards the Queen constituted Arthur Hopton, esq. sheriff of the same county, who interrupted Mitton, claiming that which was mentioned to be granted to Mitton, to be incident to his office of sheriff; and thereupon appointed a clerk himself of the county court. Mitton complained to the Lords of the Council, who referred the consideration of the validity of the grant of the said office to the two Chief Justices, Wray and Anderson, who held conferences with the other Justices; all of whom held that the said letters patent were void in

law, because the office of sheriff was an ancient office of great trust and authority ; and the King could not abridge the sheriff of any thing incident or appurtenant to his office, for the office was entire, and so ought to continue. That the county court, and the entering all proceedings in it, were incident to the office of sheriff, therefore could not by letters patent be divided from it. That although the grant was made to Mitton when the office was vacant, yet it was void; and when the Queen appointed a sheriff, he should avoid it.

14. As to grants of incidental offices by persons holding the superior offices, they must in general be by deed duly executed. Though Lord Coke says a man be retained as a steward to keep a court baron or a court leet, without deed. And it was held by the Court of K. B. in 10 Will. III. that an appointment of a clerk of the peace of a county, by the *custos rotulorum*, by parol, was good ; because it enured as an execution of a power : for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed : otherwise where it takes effect out of an interest.

1 Inst. 61 b.

Saunders
v. Owen,
1 Salk. 467.
1 Ld. Raym.
158.
12 Mod. 199.
Colles Parl.
Ca. 70.

15. If a house or land belong to an office, by the grant of the office by deed, the house or land will pass as belonging to it.

1 Inst. 49 a.

16. The restraints imposed upon bishops and other ecclesiastical persons respecting alienation, do not extend to grants of offices; so that their rights in this respect remain as they were at common law. From which it follows that bishops, &c. may grant judicial offices for the lives of the grantees, which will bind their successors ; provided such grants are made and confirmed in the manner required before the disabling statute, 1 Eliz. c. 19. § 5. was passed.

Bishops, &c.
may grant
Offices.

10 Rep. 61 a.
Ridley v.
Pownell,
2 Lev. 136.

17. It was resolved in the Bishop of Salisbury's case, 11 Ja. I., that where an office was ancient and necessary, the grant thereof with the ancient fee was not any diminution of the revenue, or impoverishing of the successor; therefore, for necessity, such grants were by construction excepted out of the general restraint of the statute 1 Eliz. And if bishops should not have power to grant offices of service or necessity, for the life of the grantees, but that their estate should depend upon uncertainties, as upon the death, translation, &c. of the bishop; then the most able persons would not serve them in such offices, or at least would not discharge their office with any alacrity.

18. It was also resolved in the same case, that where a new bishopric was erected, a grant of offices of necessity, with a reasonable fee, the reasonableness of which should be decided by a court of justice, would be good.

19. With respect to grants of honorary or ministerial offices by bishops, it has been resolved in the following case that offices which existed before the statute 1 Eliz. are not within the restraints of that statute, but that they may be granted as before; and that the utility or necessity of the office is not more material since, than it was before that statute.

Trelawney v.
Ep. Winton,
1 Burr. 219.

20. Sir J. Trelawney brought an action of debt against the bishop of Winchester, for five years salary of several offices; viz. great and chief steward of the bishopric, and of all its castles, lordships, manors, &c.; conductor of the men and tenants of the bishop, with a salary of 100*l. per annum*; master-keeper or preserver of the wild beasts, in all the forests, parks, chases, and warrens belonging to the bishop; and chief governor of all birds, fish, and beasts of warren, &c., commonly called chief parker, with a salary of

20*l. per annum.* Which offices and salaries were granted to the plaintiff by the late bishop of Winchester by letters patent, with a clause of distress if unpaid. The bishop pleaded the statute 1 Eliz. c. 19. § 5., and also that the offices aforesaid were not ancient offices of the bishopric, nor were usually granted for life ; that the said fees were not the ancient fees ; that the said offices were useless and merely nominal, no duty or service being to be done for or in respect of them.

The jury found a special verdict, that the offices of chief steward and conductor of the men, &c. were ancient offices of the bishop, and had been anciently and usually granted for life, with an annuity : that the annuity of 100*l.* was the ancient fee : that the same were granted to the plaintiff by Jonathan late bishop of Winchester, which grant was approved by the dean and chapter, and confirmed by them. They then found the statute 1 Eliz., and that these offices, at the time of making that act, and since, were merely nominal ; no duty, attendance, or service being to be done for or in respect of them. And as to the office of master-keeper of all beasts in the parks, or chief parker, they found that it was not an ancient office.

The question on this special verdict was, whether Sir J. Trelawney was entitled to hold the two first mentioned offices, and to recover the arrears against the bishop. As to the office of chief parker, the facts found by the special verdict, made an end of any question concerning it, and the point was given up.

Lord Mansfield said,—At common law a bishop, with the confirmation of his dean and chapter, might exercise every act of absolute ownership over the revenues of his see, and bind his successors, as much

as tenant in fee could bind his heir. Then came the restraining statute 1 Eliz. But patents or grants of offices, with fees, salaries, or profits annexed to them, were not mentioned in that act. There were no general words adapted to the case of offices; yet there was not a single bishopric at that time without some offices granted. Had the legislature meant to restrain the regranting them, as they should drop in, it must have been done by a special provision; with an exception of some, at least of judicial offices. As the general restraint was not extended to the case, there was no occasion to make exceptions. Continuing ancient offices with the ancient fee, in the usual manner, was not a dilapidation of the revenue of the bishopric; every bishop left this power to be exercised by his successor, as his predecessor left it to be exercised by him; such grants being no new charge upon the bishopric, which only remained liable to the same fees or salaries, to which it was liable before. And after stating several cases, he concluded in these words:—"The office in question in this case is found never to have been more useful or necessary than it is now; yet all the bishops of Winchester, from the 1 Eliz., have thought the grants of it valid; every succeeding bishop has submitted to the grant made by his predecessor; and the greatest men of the kingdom, or the nearest relations of the bishop, have successively held the office. The present bishop thought this grant good for eleven years, but has conceived a doubt, from the misapplication and repetition of inconclusive and contradictory arguments, about the office being necessary; whereas we are all unanimously of opinion that an office and fee which existed before the 1 Eliz. is not within the statute; but may be granted since, precisely in the

same manner in which it was granted before: that the utility or necessity of such an office is no more material since the 1 Eliz. than it was before. This opinion we think agreeable to the words and intent of the act, and every precedent since the statute: therefore there must be judgement for the plaintiff.

21. Ministerial offices, requiring only common skill and diligence, may be granted to two persons: and so may also some judicial offices established by act of parliament. But an ancient judicial office cannot be granted to two persons. Thus, King Henry VI. having granted the office of High Admiral to the Duke of Exeter and his son, the Judges held it to be void, the charter being of a judicial office; for such ancient offices must be granted as they formerly had been.

What Offices
may be
granted to
Two Persons.

4 Inst. 146.

2 Wm. &
Mary, st. 2.
c. 2.

22. A grant to two persons to be Chief Justices of any of the courts at Westminster would be void; but as to offices incident to the King's courts at Westminster, it seems to be in the discretion of the Judges, if they see that an office in their courts comprehends too much for one man to execute, to join another person with him. In such a case it must however be still granted as one office; for if it is divided into two or three offices, the prescription is interrupted, and it is not a grant of the ancient office.

11 Rep. 3 b.

23. Ecclesiastical offices, though of the judicial kind, may be granted to two persons, where there has been a usage of granting them in that manner.

24. The bishop of Llandaff granted the office of chancellor or commissary of his diocese to two persons, to hold the same *conjunctim et divisim*, to them and the survivor of them. It was agreed by the counsel on both sides, that this office had been anciently and usually granted in this manner. On

Jones v.
Bew,
Carth. 213.
4 Mod. 16.
1 Show. 289.

a case stated out of Chancery, and referred to the Court of King's Bench, the question was, whether this was such a judicial office as could be granted to two persons. Resolved, that it was a good grant, because of the long and constant usage. And it was said, that the offices of most of the bishoprics in England were, and had been constantly so granted.

1 Salk. 465. 25. Salkeld reports, that in this case the Court said, if an office be granted to two, and one dies, the office does not survive, but determines. As if there are two sheriffs, and one of them dies, the other cannot act : otherwise, if granted to two and the survivor of them.

What Estate
may be had in
an Office.

Dyer, 285.

26. With respect to the estate or interest which may be had in an office, several of the great offices of state were, and still continue to be, hereditary. Thus, the office of Earl Marshal was held by the Earl of Pembroke in fee simple : the office of Great Chamberlain was held by the Earls of Oxford in fee simple ; from whom it descended to the Dukes of Ancaster in the same manner ; and upon the death of Robert Duke of Ancaster in 1779, it descended to his two sisters and coheirs.

27. Although the offices mentioned in the last section are called offices in fee, yet the estate in them is not, strictly speaking, an estate in fee simple ; for it is only inheritable by the lineal descendants of the first grantee of the office ; not by any collaterals.

2 Inst. 382.
9 Rep. 48 b.
97 b.

28. The offices of sheriff, gaoler, park-keeper or forester, steward or bailiff of a manor, have also been granted in fee simple. And it is held, that where an office may be granted in fee, it may be granted for life ; or to one for life, remainder to another for life.

29. With respect to judicial offices, they cannot, in general, be granted for a greater estate than for life; because they are only exerciseable by persons of skill and capacity.

30. If an office be granted to a person, *quamdiu se bene gesserit*, the grantee has an estate for life. For as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume, that his estate can determine. If the words be, *quamdiu se bene gesserit tantum*, the estate will not be abridged by the addition of the word *tantum*.

1 Inst. 42 a.
1 Roll. Ab.
844.
Harcourt v.
Fox, 1 Show.
491.

31. The Judges of the several courts at Westminster formerly held their offices *durante bene placito*. By the statute 13 Will. III. c. 2. it was enacted, that their commissions should be *quamdiu se bene gesserint*; but that it should be lawful to remove them on an address of both Houses of Parliament. Now, by the stat. 1 Geo. III. c. 23. the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown; but may be removed on an address of both Houses of Parliament.

Id.

32. Offices which do not concern the administration of justice, and only require common skill and diligence, may be granted for years; because they may be executed by deputy, without any inconvenience to the public.

33. The office of Register of Policies of Insurance in London, was granted by the King for years; and adjudged to be a good grant, because it did not concern the administration of justice; but only required the skill of writing after a copy.

Vale v.
Priour,
Hard. 351.

34. Offices of this kind may be granted to one person in trust for another; and the Court of Chancery will compel the execution of such a trust.

Jones v.
Clerk,
Hard. 46.

Bellamy v.
Borough,
Forrest, 97.

35. No office of trust, requiring skill and capacity in the execution of it, can however be granted for years.

Reynell's
Case,
9 Rep. 95.

36. King James I. granted the office of Marshal of the Marshalsea for 31 years. It was held by the Lord Chancellor and four of the Judges, that the grant was void; because this was an office of great trust, annexed to the person, and concerned the administration of justice: that this trust being individual and personal, should not be extended to executors or administrators; for the law will not repose confidence, in matters concerning the administration of justice, in persons unknown.

Sutton's
Case,
6 Mod. 57.

37. It was determined in a subsequent case, that the office of Marshal of the King's Bench might be granted to a person for years, determinable on the death of such person; for in that case the office could not go to executors or administrators.

2 Show. R.
171.

38. Lord Hale is said to have been of opinion that an office of trust might be granted for years; for that the true reason of the determination in Reynell's case was, that the custom had been to grant it in fee. Lord Chancellor Finch is reported to have said that an office may be granted for years: for the same inconveniences attend an office in fee; and a person unknown and unfit, as an infant or feme covert, may happen to have the same, under an estate of inheritance.

39. Offices may also be granted at will. In Reynell's case, the Judges said that the office of Marshal of the Marshalsea had always been granted for life, or at will. And there is a precedent in Dyer of a grant by the King of the office of Chirographer of the Common Pleas, to hold as long as it should please his Majesty.

9 Rep. 97 a.

176 a.

40. If the King grants an office to hold at will, and grants a rent to the officer for life, for the exercise of the office; this is not an absolute estate for life, because the rent being granted on account of the office, and for discharging the duties of it, whenever the grantee's interest in the office ceases, the rent is determined. 1 Inst. 42 a.

41. Ministerial offices, and also offices which are exercisable by deputy, may be granted in reversion, or rather *in futuro*; to take effect in possession upon the death of the person then holding the office. What Offices may be granted in Reversion. Howard v. Wood, 2 Show. R. 21. Rex v. Kemp, 1 Salk. 465. Skin. 446.

42. The King granted an office to a person *durante bene placito*; afterwards granted the same office to another person for life; to commence from the death, surrender, or forfeiture of the first grantee. It was objected that the second grant was void, for the first estate being at will, could not be surrendered or forfeited; and that an estate of freehold could not depend on an estate at will.

The Court said, 1. That an estate at will in lands would not be surrendered, because it was determinable at the will of either party: but an office was not properly at the will of both parties, but at the will of the King only: for the grantee could not determine his will but by surrender. 2. It might be said to be forfeitable in some measure, and the King's tenants at will may be said to forfeit; for, in the case of forfeiture, the King would be informed by inquisition, before he determined his will; then upon the return of the inquisition, the office would be forfeited. 3. A freehold estate in lands could not be granted to commence *in futuro*, or depend on an estate at will; but a new office might be created, to commence *in futuro*; for it was the creature of him who made it, and was no otherwise in being than it was in grant;

the King did not grant a reversion but *in reversion*; and that not in respect of a particular estate, but because he was pleased to grant *in futuro*.

43. An ecclesiastical office of the judicial kind may be granted in reversion, where there is a custom and usage to support such a grant.

Young v.
Stoel,
Cro. Car.
279.
2 Roll. Ab.
153.

44. The office of Register of the Bishop of Rochester was granted to a person, to hold from the death or surrender of him who then held it for life, to be exercised by the grantee or his sufficient deputy. Resolved, that the grant was good; for although there was no reversion of an office, unless it was an office of inheritance, yet it might well be granted in reversion, *habendum* after the death of the then present officer; it being no more than a provision of a person to supply it, when it became void: and where such provision had been usually made, the custom and usage gave it a sanction.

Walker v.
Lamb,
Cro. Car.
258.
1 Inst. 3 b.

45. But where there is no custom or usage to warrant it, a judicial office cannot be granted in reversion.

Curle's Case,
11 Rep. 2.

46. King James I. granted the office of Auditor of the Court of Wards to two persons, to hold immediately from the death of the two persons who then held the office. Resolved, that this grant was void, because it was of a judicial office; and as none can give any judgement of things which may happen *in futuro*, so none can be a judge *in futuro*; and the rule was, that *officia judicialia non concedantur antequam vacent*. For he, who at the time of the grant in reversion may be able and sufficient to supply the office of judicature, before the office falls, may become unable and insufficient to perform it.

Savage's
Case,
Dyer, 259.

What Offices
may be en-
tailed.

47. All those offices which are of a real nature, and grantable in fee simple, may be entailed within

the statute *De Donis*, because they are demandable in a *præcipe ut tenementa*. Lord Coke says, the office of marshal of England, now called Earl Marshal, was entailed, as also the office of one of the chamberlains of the Exchequer. So the offices of steward, receiver, or bailiff of a manor, or that of a forester, may be entailed, because they are exercisable within lands.

Tit. 2. c. 1.
1 Inst. 20 a.
7 Rep. 33 b.
1 Roll. Ab.
838.

48. Where an office is unalienable, though it may be granted in tail by the Crown, as in the case of the office of Earl Marshal, yet it cannot be entailed by the person possessed of it. This point was fully discussed in the following case.

49. John De Vere Earl of Oxford, being seised in fee simple of the office of Great Chamberlain of England, in 4 Eliz., by deed, covenanted with the Duke of Norfolk and others, that he, his heirs and assigns, would from thenceforth stand seised thereof, to the use of himself for life, remainder to Lord Bulbeck, his son, and the heirs male of his body. Robert Earl of Oxford claimed the office under this entail, as heir male of the body of Lord Bulbeck, and Lord Willoughby claimed the same as heir general.

Collins's
Claims, 181.
Anno 1626.

Lord Chief Justice Crew delivered his opinion that the office was entailable within the statute *De Donis*; but a majority of the other Judges, amongst whom was Mr. Justice Dodridge, (a part of whose argument may be seen in Collins,) gave their opinion, that this high office was inherent in the blood of the first grantee, incapable of alienation, and therefore could not be entailed by any person seised of it.

Claims to
Baronies.

In consequence of this opinion, the Lords certified in favour of Lord Willoughby as heir general, and he was allowed to exercise the office.

When sub-
ject to Cur-
tesy and
Dower.

1 Inst. 29 a.

Collins's
Claims, 5.

1 Inst. 32 a.

Some Offices
may be
assigned.

Cent. 3.
ca. 89.
Plowd. 378.
9 Rep. 48 b.
Hob. 170.

Dennis v.
Loving,
Hard. 424.

50. Curtesy is incident to offices of inheritance. And Lord Coke has cited a record, from which it appears that John Duke of Lancaster was allowed to exercise the office of seneschal of England, at the coronation of Richard II., as tenant by the curtesy.

51. At the same coronation, John Dymock claimed the office of king's champion, as tenant by the curtesy, and was admitted to exercise it accordingly.

52. A woman may be endowed of an office of inheritance, as of the office of Marshal of the Marshalsea, to have the third part of the profits. But in such a case, she must contribute a third part of the charges. As also of the third part of the profits of the office of keeping the gaol of the abbey of Westminster.

53. Where an office is granted to a person and his heirs, or to a person and his assigns, for his life, it may in some cases be assigned. For Jenkins states it to have been held by all the Judges in the Exchequer Chamber, that when the office of Chamberlain of the Exchequer was granted to A. and his assigns, A. might assign it, but could not make a deputy, without special words to enable him.

54. There is, however, great obscurity in the books respecting the assignment of offices. In a case reported by Hardress, the question was, whether the office of Teller of the Exchequer, which had been granted to a man, *habendum* to him and his assigns, during his life, could be assigned. Serjeant Glynn contended that the office was assignable, by reason of the word assigns in the patent; but else, it would not have been assignable, being an office of trust, which concerned the King in his revenue. That some offices were in their nature assignable, without the word assigns, and some not; as a parkership was

an office assignable in its nature, being an office of profit. Others were not, viz. offices of public trust, as the office in question. So offices granted to men and their assigns were assignable; and there was no inconvenience in such a case; for if assigned to an unfit person, the Court would refuse to admit him. Sir Heneage Finch argued on the other side, 1. That the office was not assignable, without the word assigns; because it was an office of great and public trust. 2. That the *habendum* did not alter the thing, it being in the King's case; for it would be inconvenient that the King should have an officer in such a place put upon him against his will, and *habendum* to him and his assigns was no other than if it had been to him and his heirs, which would have been void. In Hatton's case, the office of a garbler granted to one with power to make a deputy, did not extend to an assignee, because it was an office of trust. There was no precedent of an assignment of such an office.

No judgement was given in this case, the King having stopped the proceedings by a writ *de rege inconsulto*.

55. In a modern case it was held, that the office of Register of the Court of Chancery was assignable. Drummond
v. St. Albans,
5 Ves. 433.

56. It is laid down by Lord Coke, that "if an office, either in the grant of the King, or of a subject, which concerns the administration, proceeding or execution of justice, or the King's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like, be granted to a man that is inexperienced, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, know- Who may
hold Offices.
1 Inst. 3 b.
Jenk. 121.

ledge, and ability to exercise the same, are capable of the same, to serve the King and his people."

Vintner's
Case.
Bro. Ab. Tit.
Office, pl. 48.
Dyer, 150.

57. King Edward IV., by letters patent, appointed Thomas Vintner to be Clerk of the Crown. The Judges of the Court of King's Bench, with the assent of the Judges of the Court of Common Pleas, refused him; because he was not exercised in his office, nor in any other in the Court, as he ought by a long time, and so declared to the King. Upon which the King, by the advice of the Justices, appointed one John West clerk there, who was expert, and sent to the said Justices his letters under his signet, which, after, were enrolled in the same Court, that they rejected Vintner, and admitted West.

Sutton's
Case,
Cro. Car. 65.

58. A clergyman was made chancellor to a bishop, and confirmed by the dean and chapter; but because he was not learned in the canon and civil law, he was removed by the ecclesiastical commissioners: though it was insisted that he had a freehold, and therefore had prayed a prohibition, yet it was denied.

Jenk. 121.

59. A grant of an office requiring skill, to an infant, to be exercised *in presenti*, is void. But if it is to be exercised *in futuro*, and that he is of full age and expert when the office is to be exercised, the grant is good.

Young v.
Steel,
ante, § 44.

60. Where, in the grant of an office, it is expressly said, that it shall be exercisable by deputy, the grantee need not have such skill and knowledge as is necessary to the execution of the office.

Lady Rus-
sell's Case,
Cro. Ja. 17.
4 Inst. 311.

61. Offices merely ministerial, which do not require particular skill and knowledge, and exercisable by deputy, may be granted to any person, and even to women. Thus, a woman may have the office of the custody of a castle. And Lord Coke mentions an instance of a woman's having the office of fo-

rester in fee simple; but he observes, that she could not execute the office herself, but was obliged to appoint a deputy, during the eyre, who should be sworn.

62. The office of High Constable was held by the daughter of Humphrey De Bohun Earl of Hereford and Essex. The office of Steward of England was held by Blanch, daughter of Henry Earl of Lancaster, in whose right John of Gaunt enjoyed the same. The office of Earl Marshal was held by a female, through whom it passed to the house of Norfolk. And the office of Great Chamberlain of England is at this moment held by the two sisters and co-heirs of Robert late Duke of Ancaster. Collins's Claims, 119. infra, § 70.

63. Offices which concern the administration of justice, such as those of Judges of the King's Courts at Westminster, &c. must be exercised in person, not by deputy. There is, however, one exception to this rule; for sheriffs, though their office concerns the administration of justice, may, notwithstanding, appoint deputies, by the name of undersheriffs. How to be exercised.

64. There are some offices of the judicial kind, in the creation or grant of which is contained a power of appointing a deputy. Thus the Chief Justices in Eyre may appoint deputies, by the express words of their patents, to exercise the office for them. 4 Inst. 291.

65. A ministerial office, which is to be exercised by the grantee in person, cannot be done by deputy. Thus it is said in Dyer, that the office of Carver, being an office of trust, cannot be exercised by deputy. But ministerial offices, which are not of trust, and do not require any particular skill, may in general be exercised by deputy. And all offices which may be assigned, may be exercised by deputy. 7 b. pl. 10. Shrewsbury's Case, 9 Rep. 46.

66. Lord Coke says, there is a great difference between a deputy and an assignee of an office. For Idem, 48 a.

an assignee is a person who has an estate or interest in the office itself, and does all in his own name, for whom his grantor shall not answer, unless it be in special cases. Whereas a deputy has no estate or interest in the office, but is the officer's shadow: he does all things in the name of the officer, and nothing in his own name; and for whom his grantor shall answer.

Parker
v. Kett,
1 Ld. Raym.
658.

67. A deputy cannot in general make a deputy; for a deputy being only authorized himself, cannot delegate his authority to another. But it has been held, that a steward of a manor, who is authorized to exercise the office by himself, or his sufficient deputy, may enable another person to take a surrender of a copyhold out of court.

1 Inst. 107 b.

68. Offices of inheritance may be exercised by deputy, in case the persons entitled for the time being are incapable of exercising them in person; as where such offices descend to infants or women, or to a person under the rank of a knight: thus the offices of earl marshal and high constable may be exercised by deputy.

Buckingham's Case,
Dyer, 285 b.
1 Inst. 165 a.

69. Humphrey de Bohun, Earl of Hereford, held the manors of Harlefield, &c. of the King, by the service of being Constable of England; and had issue two daughters. Upon a question how the daughters, before marriage, could exercise the office; it was resolved that they might make their sufficient deputy, to do it for them: and after marriage the husband of the eldest might do it alone.

2 Bro. Parl.
Ca. 146.

70. In the case respecting the office of great chamberlain of England, which was heard in the House of Lords in 1782, Lady Willoughby de Eresby (the wife of Mr. Burrell, since created Lord Gwydyr), who was the eldest of the two sisters and coheirs of

ante, § 26.

Robert Duke of Ancaster, claimed the office. It was contended on her part, that if there was any ground to say that the office had descended to both the sisters, still the right to exercise the office belonged to Mr. Burrell, as the husband of the eldest, it being an hereditary office in gross, held in grand serjeanty; and in the case of coheirs, when the eldest happened to be a feme covert, was to be executed by her husband. That this was perfectly agreeable to, and warranted by, the usage in all such great offices as had in the course of time descended to heirs general. The office of steward of England had descended in two instances to the eldest daughter. The office of constable of England had come from Humphrey de Bohun, by his marriage with the eldest daughter of Milo Fitzwalter. The office of earl marshal of England came to Roger Bigot, Earl of Norfolk, in right of his mother Maud, who was the eldest daughter of William Marshall, Earl of Pembroke.

The following question was put to the Judges:— Lords Journ.
Vol. 36. 302.
“The late Duke of Ancaster having died seised of the office of great chamberlain of England, leaving Lady Willoughby de Eresby and Lady Charlotte Bertie his sisters and coheiresses; does the said office belong to the eldest alone, or to both; or in either case is the husband of the eldest entitled to execute the said office; or may both sisters execute it by deputy; and how must such deputy be appointed? Or does it devolve upon the king to name a proper person to execute the office, during the incapacity of the heir?”

The Judges delivered their unanimous opinion,—
“That the office belonged to both sisters; that the husband of the eldest was not of right entitled to execute the said office. That both sisters might

execute it by deputy, to be appointed by them ; such deputy not being of a degree inferior to a knight, and to be approved of by His Majesty.”—The Lords certified accordingly ; and Mr. Burrell, being created a knight, was appointed deputy.

Qualifica-
tions re-
quired.

71. With respect to the oaths required to be taken, and the ceremonies to be performed, as qualifications for holding offices ; it is enacted by the stat. 18 Cha. II. c. 1. § 12., that no person shall be chosen to any office of magistracy, place of trust, or other employment, relating to the government of any city, corporation, borough, cinque port, or other port town, who shall not have received the sacrament according to the rites of the church of England within one year next before such election ; and that every person so placed or elected shall take the oaths of allegiance and supremacy.

72. By the stat. 25 Cha. II. c. 2. commonly called the test act, it is enacted, that every person who shall bear any office civil or military, by reason of any patent or grant from His Majesty, must take the oaths of allegiance and supremacy and test ; and receive the sacrament within three months : in case of neglect, he shall be disabled to hold the said offices, &c. and forfeit 500*l*.

An act is passed regularly every year to indemnify persons holding offices, who have neglected to qualify themselves according to the provisions of this statute.

73. By the stat. 5 Geo. I. c. 6., it is enacted, that all persons in the actual possession of any office, that are required by the test act to take the sacrament, &c., shall be confirmed in their respective offices, and none of their acts be questioned, notwithstanding their omission to take the sacrament ; nor shall they be removed, or otherwise prosecuted, for or by reason

of such omission, unless such person be so removed, or such prosecution commenced, within six months after the election.

74. The intention of the test act was to exclude persons who were not of the church of England from all offices which concern the government; and is to be considered as prohibitory on the electors, *quoad* such persons. A dissenter being therefore ineligible to such offices, cannot be fined for refusing to accept of them.

75. The corporation of the city of London, by a bye law, imposed a fine of 600*l.* upon every person who, being elected, should refuse to serve the office of sheriff. The chamberlain of London levied debt on a person named Evans, for the penalty of his refusal to serve the office of sheriff; who pleaded the statute 13 Cha. II., averring that he was a protestant dissenter, within the toleration act, of scrupulous conscience, and therefore had not received the sacrament. The plaintiff replied the 5 Geo. I. which confirms members of corporations in their respective offices, though they have not received the sacrament. To this the defendant demurred, and judgement was given in favour of the city; but reversed by a special commission; and the reversal affirmed by the House of Lords.

Harrison
v. Evans,
3 Bro. Parl.
Ca. 465.
Wilmot, 130.

ante, § 73.

76. It is enacted by the stat. 5 & 6 Edw. VI. c. 16. that all persons who shall sell any offices, shall lose and forfeit all their right, interest, and estate in such offices, and in the gift and nomination thereof; that all persons who shall purchase such offices, shall be disabled from occupying or enjoying the same; and that all such bargains shall be void; with a proviso, that all acts of persons offending against this statute,

Statute
against sel-
ling or buy-
ing Offices..

done before they are removed from their offices, shall be good and valid.

3 Inst. 148.

77. This statute extends to ecclesiastical, as well as to temporal offices, which concern the administration and execution of justice. Thus it was resolved, in the case of Doctor Trevor, chancellor of a bishop in Wales, that both the office of chancellor, and that of register, of a bishop, were within the statute; because they concerned the administration of justice.

Trevor's
Case,
Cro. Ja. 269.

Croke in his report of that case says, it was held that although such offices concerned matters principally *pro salute animarum*, yet they also concerned matters about matrimony, and legitimacy, which touched the inheritance of the subjects.

Woodward
v. Fox,
3 Lev. 289.
2 Vent. 187.
Willes R.
571.

78. The office of archdeacon's register is within the statute; and though the persons to whom the sale and grant was made die, yet the archdeacon selling such office, is disabled by this statute from making any other grant thereof; and the king shall have the nomination.

79. The office of cofferer of the king's household is within this statute; so that if a person purchases this office, he becomes thereby disabled from enjoying it.

Ingram's
Case,
1 Inst. 234 a.
Cro. Ja. 386.

80. Sir R. Vernon being cofferer of the king's house, sold the same, for a certain sum of money, to Sir A. Ingram, and agreed to surrender it to the king, to the intent that a grant might be made of it to Sir A. Ingram. The surrender was accordingly made, and Sir A. I. was admitted. It was resolved by Lord Chancellor Egerton, the Chief Justice, and others, to whom the king referred the same, that this sale was void by the statute; that Sir Arthur was disabled to hold the office; and that the king could not,

by a *non obstante*, dispense with this act, so as to enable Sir Arthur to enjoy the office at any time ; even by a new grant upon a subsequent vacancy.

81. It was resolved, in a modern case, that a contract with the warden of the Fleet prison, who held only for life, under the crown, that for a sum of money, he should surrender the office to the king, to the intent that he should procure from the king a grant of the office to the purchaser, was void by the statute 5 & 6 Edw. VI., though that office had been, and might be granted to a subject in fee ; and that a bond given to secure the payment of such consideration money, could not be enforced in a court of law.

Huggins v. Bambridge, Willes, 241.

82. In another case it was held, that a bond given by any of the officers mentioned in the statute 5 & 6 Edw. VI., for securing all the profits of an office to the person appointing, was void by that statute. So was a bond given by such an officer, to surrender the office whenever the person appointing chose.

Layng v. Paine, Willes, 571.

Law v. Law, Forrest, 140.

83. An agreement by a deputy, to pay his principal half the profits of the office, is not within the statute, because it is not to pay him a sum in gross, but only a part of the profits ; which must be sued for in the principal's name, for they all belong to him ; though a share is to be allowed out of them to the deputy for his trouble. But where an auditor of Wales appointed a deputy ; and it was agreed between them that the deputy should receive all the fees, &c. and pay the principal a certain sum of 200*l.* *per annum*, this was held void.

Culliford v. De Cardonel, 2 Salk. 466. Godolphin v. Tudor, Id. 1 Bro. Parl. Ca. 135.

Parsons v. Thompson, 1 H. Black. 322.

84. By the fourth section of this statute it is provided, that it shall not extend to any offices whereof any person shall be seised of any estate of inheritance, nor to any office of parkership, or of the keeping of any park, house, manor, garden, chase, or

What Offices are not within the Statute. Willes R. 241.

forest. By the seventh section it is provided, that the act shall not be prejudicial to the Chief Justices of the King's Bench and Common Pleas, or to any of the Justices of assise, touching or concerning any offices to be given or granted by them.

85. The offices of the sixty clerks in Chancery are not within this statute, nor the office of bailiff of a hundred; for it is not an office of trust, nor does it concern the administration of justice.

Godbolt's
Case,
4 Leon. 33.

Prec. in Cha.
199.

Symonds v.
Gibson,
2 Vern. 308.
5 Burr. 2698.
1 H. Black.
326.

Vide stat.
19 Geo. III.
c. 12.

86. This statute does not extend to commissions in the army. And it was formerly held, that the office of purser of a ship of war was not within it. But Lord Mansfield has said, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted.

87. By the statute 49 Geo. III. c. 12. it is enacted, that all the provisions of the stat 5 & 6 Edw. VI. shall be extended to Scotland and Ireland. And that when the interest of any person shall be forfeited under that act, or this act, the right of such appointment shall immediately vest in and belong to the Crown.

Where
Equity will
interpose.

Treat. of Eq.
B. 1. c. 4.
§ 4.

88. As the provisions of the statute 5 & 6 Edw. VI. do not extend to all the cases within the mischief which it was intended to prevent, courts of equity have frequently interposed; for though penal laws are not to be extended, as to penalties and punishments, yet, if there be a public mischief, and a court sees private contracts made to elude laws enacted for the public good, it ought to interpose.

Morris v.
McCulloch,
Amb. 432.

89. A person gave a sum of money to another for procuring him a commission in the marines. Lord Henley decreed the bargain void; and said—"I lay down this rule, that if a man sells his interest, to

procure a permanent office of trust or service under government, it is a contract of turpitude; it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the Crown, for their abilities, and with purity."

90. Lord Rochfort being Groom of the Stole to His Majesty, and having the right of recommending pages of the presence, treated with the plaintiff's testator, to recommend him upon a vacancy, on condition that he should grant two annuities to particular persons. An action being brought on the bonds securing these annuities by the defendant's testator, for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled. Upon a motion to continue the injunction, upon the merits, the answer being put in, it was argued on the part of the plaintiffs, that the bonds were *pro turpi causa*: that Lord Rochfort having a confidence placed in him by the King, had abused that confidence by selling his recommendation; and that upon the public policy of the law, such an agreement ought not to stand. On the other hand it was argued, that it was allowed this was not an office within the statute of Edw. VI.: that it was merely an office respecting the King's private, not his public character; and if it was *turpis contractus*, that might have been pleaded at law.

Lord Thurlow expressed his doubts whether it might not have been brought upon the record at law, by a plea, and made a defence there to the action: but thought that not a sufficient reason to prevent his interposition; the courts of law never having determined that it could be so brought there

Hancington
v. Du Chatel,
1 Bro. R. 124.

as a defence : admitting that it was not within the statute of Edw. VI., but treating it as a matter of public policy, and similar to marriage brokerage bonds ; where, though the parties are private persons, the practice is publicly detrimental. He ordered the injunction to be continued till the hearing ; afterwards, upon the hearing, he ordered it to be perpetual.

Hartwell v.
Hartwell,
4 Ves. 811.

How Offices
may be lost.

91. Offices may be lost by forfeiture ; by acceptance of another office incompatible with that which the person holds ; and by the destruction of the principal office ; or the determination of the thing to which the office was annexed.

By Forfeiture.

92. It is, a general rule, that if a person does any act which is contrary to the nature and duty of his office ; or refuses to perform the services annexed to it, the office is forfeited ; for in the grant of every office, there is a condition implied, that the grantee shall execute it faithfully and diligently.

9 Rep. 50 a.

93. It was said in Lord Shrewsbury's case, that " there are three causes of forfeiture or seizure of offices ; for matter of fact : as for abusing, not using, or refusing. Abusing or misusing ; as if the marshal or other gaoler suffer voluntary escapes, it is a forfeiture of their offices : so if a forester or park-keeper fell and cut down wood, unless for necessary brush, it is a forfeiture of their offices ; for destruction of vert is destruction of venison. As to non-user, there is a difference : when the office concerns the administration of justice, or the commonwealth, and the officer *ex officio*, or of necessity, ought to attend without any demand or request ; there the non-user or non-attendance in court is a forfeiture. As the office of chamberlain in the Exchequer, prothonotary, &c. in the Common Pleas, &c. ; for the attendance of these

and the like officers is of necessity, for the administration of justice. So the attendance of the Clerk of the Market is of necessity for the common wealth : so of holding the sheriff's tourn. But when the officer ought not to attend or exercise his office, but on demand or request to be made by him to whom he is officer ; there, non-user or non-attendance is no cause of forfeiture, without demand or request made. But when the office concerns any man's private property, and the officer ought, *ex officio*, to attend his office without request ; there the non-user or non-attendance is no cause of forfeiture, unless the non-user or non-attendance is cause of prejudice or damage to him whose officer he is, in something which concerns his charge. As if a parker, or *custos parci*, does not attend one or two days, and within these days no prejudice or damage happens, it is no forfeiture : but if, by reason of his absence, persons unknown kill any deer, it is a forfeiture of his office. As to refusal ; it is to be known, that in all cases when an officer is bound, upon request, to exercise his office, if he do it upon request, it is a forfeiture. As if the steward of a manor is requested by the lord to hold a court, which he does not, it is a forfeiture."

94. A filazer of the Court of Common Pleas was absent from his office during two years ; and farmed it from year to year, without leave of the Court, for which he was discharged ; and no record of the discharge was entered on the roll. Upon his bringing an assise, this was held a good discharge. Vaux v. Jefferen, Dyer, 114 b.

95. If a tenant in tail of an office commits a forfeiture, it shall bind the issue by force of the condition *tacite*, annexed by law to such estate. But if

an officer for life commits a forfeiture, this shall not affect the person entitled to the inheritance.

Bro. Ab. Tit.
Deputy, pl. 7.

96. If the deputy of an office in fee does any act by which the office is forfeited, the inheritance of the office is thereby lost. But if a person having an office of inheritance, leases it for life, and the lessee commits a forfeiture, this shall not operate as a forfeiture of the inheritance.

2 Lev. 71.
3 — 288.

Bro. Ab. Tit.
Office, pl. 51.

97. It has been held in some cases, that where there are two joint officers, the forfeiture of one is a forfeiture of the other; for both are one and the same officer, and the office is entire. It has, however, been determined, that where an office is granted to two, and one of them is attainted of treason, the other shall not forfeit.

Neville's
Case,
Plowd. 378.

98. Sir E. Nevill, and Henry Nevill his son, were keepers of Alyngton Park, with a certain fee, during their lives, and the life of the longest liver of them. Sir E. Nevill was attainted of treason. The question was, whether the King should have the office by the attainder. Resolved, that being only an office of skill and confidence, the same was not forfeited to the King: but that the survivor should hold the same during his life.

Woodward
v. Fox,
ante, § 78.
Poph. 119.
2 Vern. 174.

99. Where an ecclesiastical office is forfeited, the benefit of it goes to the King, as supreme ordinary. And where a principal officer is authorized to appoint inferior officers under him, if such inferior officers commit a forfeiture, the superior officer shall take advantage thereof.

Acceptance
of an incom-
patible Office.

100. A person may lose an office by the acceptance of another office, incompatible with that which he already holds. And all offices are incompatible and inconsistent, where they interfere with each other; for that circumstance creates a presump-

tion that they cannot be both executed with impartiality.

101. Thus where a forester by patent for life, 4 Inst. 310. having been made justice in eyre of the same forest, *hac vice*, the forestership was held to become void ; for these offices were incompatible, because the forester was under the correction of the justice in eyre, and he could not correct himself.

102. Upon a mandamus to restore a person to the office of town clerk, it was returned, that he was elected mayor, and sworn, therefore they chose another town clerk. The Court was strongly of opinion that the offices were incompatible, because of the subordination. Rex v. Pergam, Sid. 305. Milward v. Thatcher, 2 Term R. 81.

103. An incidental office may be lost by the destruction of the principal office, or the determination of the thing to which the office was annexed. Destruction of the Principal.

104. King James, by his letters patent under the great seal, granted *officium custodis* of a park to Sir Charles Howard, *habendum* to him for life. All the justices and barons agreed, that the park being dissolved, the office was determined ; for the office being only an accessory, must follow the fate of the principal. It was also said, that if a person grants the office of steward of a manor, with all profits of courts, &c., and the manor is afterwards destroyed, the office of steward, together with the casual profits annexed to it, is determined. Howard's Case, Cro. Car. 59,

105. In the above case, an annual fee of 40*l.* had been given to the parker, issuing out of the king's manors in the county of Surry ; and a question arose, whether that was determined by the destruction of the park. Walter, Ch. B. held that it was ; but all the other justices and barons dissented from him, be-

cause the annual fee was granted by a distinct clause, and not out of the park ; and although the office was determined, yet because it was not by the act or default of the grantee himself, but by the act of the grantor only, they conceived the grantee should enjoy the annuity.

TITLE XXVI.

DIGNITIES.

CHAP. I.

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CHAP. I.

Of the Origin and Nature of Dignities.

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SECTION 1.

THE dignities or titles of honour which now exist in England derive their origin from the feudal institutions, and were first introduced here by the Normans.

Dissert. c. 1.
§ 40.

All the feudal writers agree, that where a feud was granted by a sovereign prince, to hold immediately of himself, with a jurisdiction in civil and criminal cases, it was called a *feudum nobile*, and conferred nobility on the person to whom it was granted.

2. Where a title of honour was annexed to a *feudum nobile*, it was called a *feudum dignitatis*. And all feudal sovereigns claimed and exercised the right of erecting a particular tract of land into a *feudum dignitatis*; by annexing to it a dignity or title of honour.

Lib. 2.
Tit. 10.

Thus it is said in the *Liber Feudorum*—*Qui a principe de ducatu aliquo investitus est, dux solito more vocatur. Qui vero de marchia, marchio dicitur. Qui vero de aliquo comitatu investitus est, comes appellatur.* From which it appears that feudal dignities were those of duke, marquis, and earl, and were not mere personal distinctions, but annexed to lands.

3. The dignities of earl and baron were well known in Normandy, at the time of the conquest; and were strictly feudal, being annexed to lands. Thus we read in the *Grand Coustumier*, c. 34. *Unde notandum est quod quedam sunt feuda capitalia, quedam subposita. Capitalia sunt quæ in capite tenentur, ut comitatus, baronia, et feuda loricæ.* And it appears from the 53d chapter, that the nobility of Normandy had a jurisdiction over their vassals. *Milites autem et libere tenentes qui habent comitatus vel baronias, vel dignitates alias feudales, vel feoda loricæ, vel francas sergenterias, vel alia franca feoda ac libera, habeant curias suas de suis residentibus, in simplicibus querelis, levibus et grossis mobilium et hereditatum, et de latrocinio, licet per quendam habeant terminari.*

4. There was a species of fief noble in Normandy called an honour, to which a dignity was always an-

nexed; and in Duchesne's Collection of Norman Historians, there is a list of the great fiefs in Normandy, in which mention is made of several honours.

5. Upon the establishment of the Normans in England, the Conqueror conferred the estates of such of the Saxon Thanes, as had fallen in the battle of Hastings, on his principal followers as strict feuds; to be held immediately of himself, by fealty, homage, and military, or other honourable services. These were *feuda nobilia*; the persons to whom they were given became, by such grants, English nobles; and when about the 20th year of William's reign, the tenure of all the lands in England was declared to be feudal, those who held immediately of the Crown by military or other honourable services, constituted the nobility, or first class of persons in the kingdom.

English Nobility.

Dissert. c. 2. § 1.

6. At this period the feudal law was fully established in all the kingdoms of Europe. William held the duchy of Normandy of the Crown of France as a strict feud; and the only ideas of government which he or his followers could entertain, must have been purely feudal. Now it was an universal principle of that polity, that the lord should hold a court for the administration of justice, and the government of the signiory, which was composed of himself and his vassals, who were bound by their tenure to attend, and assist him with their advice.

Of the Curia Regis ad Parliament.

Craig, Lib. 2. Tit. 2. § 10.

7. In conformity to this principle we find that the first monarchs of the Norman line held a great court in their palaces at Christmas, Easter, and Whitsuntide; which was attended by all their immediate vassals, and was called *curia regis*. These were so regular, as to be called by the old historians *curia de more*, or *curia regis de more coadunata*, for which no summons was necessary: if the king wanted to

consult his barons at any other time, he used to send them a summons to attend him on a particular day. These latter councils are called by Eadmerus, *conventus principum ex præcepto regis*; to distinguish them from the former regular meetings, at the three great festivals.

8. The power of feudal sovereigns over their vassals was extremely limited; they had no right to demand any services or duties but those which were expressly reserved upon the investiture of the feud: therefore as to all things extra-feudal, the particular consent of the vassals was necessary. Hence arose the practice of summoning them to the lord's court, to procure their consent to such new measures as the sovereign might wish to adopt; but particularly to obtain their concurrence to any new tax or imposition; which gave rise to those general assemblies that upon the continent were called states-general, and in England parliaments.

9. The *curia regis* was therefore the original of our parliaments; though in process of time the general meetings of all the barons, when called together by a summons from the king, acquired the names of *magnum consilium*, and *commune consilium regni*; and the appellation of *curia regis* was only applied to that constant and permanent court, which was held in the king's palace, for the administration of justice, and the management of the king's revenue.

10. The duty of attending the *curia regis* conferred a species of dignity on those who were bound to it, by which they came to be considered as a distinct and superior class of persons. They were called peers from the word *pares*, which in the feudal law denoted persons holding of the same lord, under the same tenure, laws, and customs, and with equal powers;

Craig. Lib. 2.
2 Tit. 2. § 10.

Spelm. Gloss.
Voce Pares.

for in that system, the tenants of every lord who met together in his court, to determine the disputes arising within his seignior, were called *pares curiæ*.

11. In conformity to those feudal principles which have been stated in the preceding sections, we find that during the reign of William I. and that of his sons, and even down to the end of the time of King Henry III., every person who held his lands immediately of the Crown, as an earldom or barony, or by the service of one or more knights, was a member of the *magnum consilium*, or *parliament*.

12. Mr. Selden has produced such proofs of this fact, during the reigns of William Rufus and Henry I., as might be expected from the paucity of materials relating to that period. As to the reign of King Henry II. he says,—“ To the parliament of Northampton also, or the *magnum consilium*, as Roger of Hoveden and others call it, held in October, 11th year of Henry II. or 1165, all that were tenants in chief were summoned. *Castro Northamptoniæ*, (saith an ancient writer of the life of Thomas Becket, archbishop of Canterbury, speaking of the king) *solenne statuens celebrare consilium, omnes qui de rege tenebant in capite, mandari fecit.* ”

Tit. of Hon.
part 2. c. 5.
§ 20.

13. In the reign of King John, we have the unanswerable evidence of *magna charta* to this fact; for in that celebrated statute, there is an express stipulation, to summon to the *commune consilium regni*, not only all the earls and barons, but also all the king's tenants *in capite*. *Omnes illos qui de nobis tenent in capite.* c. 14.

14. The persons who held their lands immediately of the Conqueror, are all enumerated in Domesday, and in the appendix to Doctor Brady's Introduction to the History of England: they do not exceed seven

1 Inst. 108. hundred, several of whom held in socage. These possessed all the lands in the kingdom, except what belonged to the church, and to the crown.

Barones Ma-
jores et
Minores.

15. In the reign of King John an alteration of great importance took place in the rights of the barons and tenants *in capite*; for only the principal barons, or *barones majores*, were summoned to attend parliament, by particular writs from the king; and the rest, who acquired the appellation of *barones minores*, were called by one general summons, from the sheriffs of their respective counties.

This practice was recognized and legally established by the *magna carta* of King John, c. 14., by which it was declared, that parliaments should in future be summoned in that manner.—*Et ad habendum commune consilium regni de auxilio assidendo, aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras, et preterea faciemus summoneri in generali per vicecomites nostros, omnes illos qui de nobis tenent in capite, &c.*

Id. c. 5. § 21. 16. Selden supposes, that in consequence of the quarrels between King John and the barons, several baronies had escheated to the Crown; either by attainder or otherwise; which were partly granted to others, and partly retained as rewards for those who should come over to the king. That several barons were also so decayed in their estates, as not to be able to support their rank: and the ancient barons, or *barones majores*, who retained their possessions, foreseeing that their dignity might be diminished, if the new tenants in chief, or grantees of the escheated baronies, and the decayed barons, should remain equal to them; procured a law in some of the par-

liaments preceding the Great Charter, by which they only in future should be stiled barons; and the rest, tenants in chief only, or knights: but because their ancient name could not be wholly taken from them, therefore the addition of *maiores* was given to the ancient and more powerful barons; and that of *minores* to the others.

17. From this period the right of sitting in parliament appears to have been confined to those persons who were possessed of entire baronies. But in the reign of King Henry III. a still greater alteration took place in the rights of the barons: for whereas every tenant *in capite* was, before that period, *ipso facto*, a parliamentary baron, and entitled to be summoned, either by the king's writ, or by the sheriff; yet about that time some new law is said to have been made, by which it was established, that no person, though possessed of a barony, should come to parliament, without being expressly summoned by the king's writ.

Necessity of
a Writ of
Summons.

18. This fact was first mentioned by Camden, who cites an ancient writer, without naming him, as his authority. *Ille enim, (Hen. III.) ex satis antiquo scriptore loquor, post magnas perturbaciones et enormes variationes inter ipsam regem, Simonem De Monteforti, et alios barones, motas et susceptas, statuit et exequit, quod omnes illi comites et barones regni Angliæ, quibus ipse rex dignatus est brevia summonitionis dirigere, venirent ad parlamentum, et non alii; nisi forte dominus rex alia, vel similia brevia, eis dirigere voluisset.*

Brittania.
Introd.

19. Selden appears to have given but little credit to this narration; and says he never could discover who this ancient writer, cited by Camden, was: but thought that not long after the Great Charter of King John, some law was made that induced the utter ex-

Id. c. 5. § 21.

clusion of all tenants in chief from parliament, beside the ancient and greater barons, and such others as the king should in like manner summon.

Names of
Dignities.

20. With respect to the different orders, and names of dignities, the most ancient are those of baron and earl. Spelman says, the word *baro* was introduced here by the Normans: It was originally synonymous with *homo*: and a very learned French antiquary was of opinion, that all those persons to whom feuds were granted by kings and sovereign princes, were called *barones et homines regis, sive qui hominum regi debent*.

Baluse Capit.
v. 2. 692.

Id. § 17.

Selden says, that in the extracts out of the Inquisitions taken in the time of King John, the phrases of *tenentes per baroniam et servitia militaria*, and *milites et barones tenentes in capite de rege*, are used for the same persons. In another place he observes, that *tenere de rege in capite, habere possessiones sicut baroniam*, and to be a baron, with a right to sit with the rest of the barons, in councils, or courts of judgment, according to the laws of that time, were synonymous. And Spelman says, *Ævo Henrici secundi quævis tenura in capite, habebatur pro tenura per baroniam*.

Gloss. voce
Baronia.

2 Inst. 6.

21. Lord Coke has observed, that in ancient records, the barons included the whole nobility of England; because regularly all noblemen were barons, though they had a higher dignity: and the great council of the nobility were all comprehended under the name of the council *de baronage*.

22. In consequence of the practice of subinfeudation, the great lords called their immediate vassals barons; particularly those who were earls palatine. Thus the earls of Chester had their barons: the city of London and the cinque ports had also their barons: the parliamentary barons were therefore called *barones*

regis, or *barones regni*; in order to distinguish them from those inferior barons.

23. The next name of dignity is *comes*, earl, which was also introduced here by the Normans. An idea Seld. Id. § 7. formerly prevailed, that the appellation *comes* arose from the circumstance of the earl's being *comes et socius fisco in percipiendis*; because generally the earl had a third part of the profits arising from the pleas of the county: but Selden dissents from this opinion.

24. The next name of dignity, in point of antiquity, and the first in rank, is that of *dux*, duke; which originally signified the commander of an army, not only among the Romans, but also during the middle ages.

25. The first creation of this title, as distinct from that of earl; for in elder times, Selden says, they were synonymous; was in the eleventh year of King Edw. III. when that monarch created his eldest son the Black Prince, being then Earl of Chester, into the title of the Duke of Cornwall.

26. As *dux* and duke was used in the description Seld. Id. § 30. of earls, many ages before it became a distinct dignity of itself; so also that of *marchio*, or marquis, was sometimes used both for earls and barons; but especially for those who were lords marchers, or governors of frontier provinces; from whence the word originated.

27. The title of marquis, as distinct from other titles of honour, was unknown in England until the beginning of the reign of King Richard II., who created Robert De Vere, then Earl of Oxford, Marquis of Dublin.

28. The most modern title is that of viscount, which in point of rank is between that of earl and of

baron. It was first introduced into England by King Henry VI., who created John Lord Beaumont, Viscount Beaumont, by letters patent.

Dignities by
Tenure.

29. With respect to the various modes by which dignities may be created, it has been shown that all dignities were originally annexed to the possession of certain estates in land; and therefore must have been created by a grant of those estates. Thus Ingulphus says of William I., *Comitatus et baronias Normannis suis distribuit*. These were clearly dignities by tenure, of which there are some instances to be found in our ancient records.

30. The dignity of baron was formerly annexed to the possession of the manor of Kingston Lisle, in Berkshire, as appears by a patent under the great seal, and with the authority of Parliament, in 22 Hen. VI., expressly declaring that the possessors of that manor had been, by reason of that possession, barons and lords of Lisle; and by that name had place and seat in Parliament from time immemorial; and confirming that right to John Talbot, the person who then possessed it, his heirs and assigns for ever, being lords of the said manor; by which, Lord Coke says, he had a fee simple, qualified in the dignity, determinable by the alienation of the manor. By another patent, 15 Edw. IV., reciting as in the former, and that Edward Grey was seised in right of his wife, Elizabeth, of the said manor, that prince grants to the said Edward Grey the title and dignity of Baron Lisle, to hold to him and his heirs, by the said Elizabeth.

1 Inst. 27 a.

31. In the Rolls of Parliament, 11 & 27 Hen. VI., there are some proceedings respecting the earldom of Arundel, in which it is distinctly admitted by the House of Lords and the Judges, that the dignity of

earl was annexed to the seisin and possession of the castle and honour of Arundel. These will be fully stated hereafter. § 50. 51.

32. There is great reason to believe, that for the first two centuries after the conquest, every lord of a manor who held of the King *in capite* was deemed a baron, and his manor a barony. When the great lords had created inferior manors to be held of themselves, it is probable that those only who possessed what Bracton calls *maneria capitalia*, were called *barones majores*, and retained the dignity of barons; while those who had only a *manerium non capitale*, were called *barones minores*. And the Crown having ceased to summon them to Parliament in the reign of King John, or that of his son, they lost the dignity, together with the appellation of barons, and became mere lords of manors. Dissert. c. 3. § 36, &c.

33. Every barony had a principal mansion or castle upon it, which was called the *caput baronie*; and was so appropriated to the person entitled to the barony, that a widow was not dowable of it. And where a barony descended to daughters, the *caput baronie* was allotted to the eldest. 2 Inst. 16.

34. It has been stated, that every lord of a manor had a jurisdiction over his tenants. In the greater manors, this was in criminal as well as in civil cases. And Spelman thought that a criminal jurisdiction was the circumstance which constituted a barony; for a civil jurisdiction was incident to every manor. Dissert. c. 3. § 38.

35. It was essential to a barony that it should be held of the Crown *in capite*. And it is said in a tract, intituled, "An Inquiry into the Manner of creating Peers," supposed to have been written in 1719, by Mr. West, afterwards Lord Chancellor of Ireland, that although every barony was a tenure *in capite*, Gloss. voce Baro.

yet every tenure *in capite* was not a barony. That since the term tenant *in capite* was equally applicable to all services, what distinguished a baron from all other tenants *in capite*, must have been the reservation of some particular services, which were implied in the

I Inst. 222 a.

2 Rep. 80 a.

6 — 73 a.

Collins, 109.

132. 184.

infra, § 40.

words *tenere per baroniam*. There are some authorities in our books, to show that all the ancient baronies were held by grand-serjeanty ; and that the particular and honorary service due for a barony, was attendance in Parliament, when summoned.

Lib. 9. c. 4.

36. In Glanville's time, the relief of a knight's fee was 100 s., but that of a baron was uncertain. It was afterwards declared by the *magna charta* of King John, c. 2., that the ancient relief of a baron, *de baronia integra*, was 100 marks.

Bract. 84 a.

2 Inst. 7.

37. A barony was sometimes called an honour, as appears from the following passage in Spelman's Glossary.—*Honor ab Anglo Normannis dictum videtur uniuscujusque majoris baronis feudale patrimonium, seu baronia. Uti manerium plurimis gaudet (interdum feodis sed plerunque) tenementis consuetudinibus servitiis, &c. Ita honor plurima complectitur maneria, plurima feoda militaria, plurima regalia, &c. Dictus etiam hic olim est beneficium seu feodum regale, tentusque semper a rege in capite.* The proprietors of these baronial estates, or land baronies, were all entitled to sit in parliament till the reign of Henry III., who made a law, which has been already stated, that no person should attend parliament without a writ of summons. And though it has been shown that this law did not apply to the great barons, yet probably the Crown frequently availed itself thereof, by omitting to summon some of the lesser barons, or those who acquired estates held *per baroniam* ; for some passages in our antient records evince, that after the

Voce Honor.

reign of Hen. III. all tenants *per baroniam* were not peers of parliament.

38. It is stated in Mathew Paris, anno 1070, that soon after the Conquest, the lands of the bishops and great abbots, which had been held before in *frank-almoigne*, were declared to be baronies; by which the bishops and abbots were bound to attend the *curia regis*. It is, however, probable that they did not willingly acquiesce in this alteration; for when the immunities of the church were so much restrained at Clarendon, it was expressly enacted, that all ecclesiastics who held their lands of the King, should thereafter hold *per baroniam*, and attend the *curia regis*.

Seld. Id.
§ 20.

Archiepiscopi, episcopi, et universæ personæ qui de rege tenent in capite, habeant possessiones suas de rege sicut baroniam: et inde respondeant justiciariis et ministris regis: et sequantur et faciant omnes consuetudines regias: et sicut cæteri barones, debeant interesse judiciis curiæ regis cum baronibus: quousque perveniatur ad diminutionem membrorum, vel ad mortem.

Spelm.
Concil.
1 Inst. 70 b.
n. 297 a.
4 Inst. 45.

39. Lord Coke observes, that unless an ecclesiastical person held *per baroniam*, the King had no right to summon him to parliament; consequently he was not bound to obey such summons: because *quoad secularia*, he is *mortuus in lege*, therefore not capable to have voice in parliament, unless he held *per baroniam*. And though such a prelate regular had been often called by writ, and had, *de facto*, had voice and place in parliament, yet if *in rei veritate* he held not *per baroniam*, he ought to be discharged of that service, and to sit in parliament no more.

4 Inst. 44.
Collins, 111.

40. The abbot of St. James, near Northampton, was summoned to parliament by King Edw. II., but upon showing that he did not hold of the Crown *per baroniam*, he was excused. In the next reign, the

Seld. Id.
§ 24.
4 Inst. 44.

abbot of Leicester obtained letters patent, reciting that he did not hold any lands *per baroniam*, *per quod ad parlamenta seu consilia nostra venire teneatur*, and declaring that he and his successors should be forever exonerated from coming to parliament. From which it may be inferred, that the particular service due for a tenure *per baroniam*, was attendance on parliament, when summoned.

41. The dignity of earl was originally annexed to the possession, either of an entire county, with *jura regalia*; in which case the county became palatine, and the earl thereof had royal jurisdiction, both civil and criminal, and royal seignior; as in the case of the earldom of Chester: or where the King created a person earl of a county with the third part of the profits of the pleas of such county court: or where the King granted a considerable tract of land to a person, to hold *per servitium unius comitatus*: in all which cases the earldom was held by tenure.

42. An earldom, like a barony, was a feudal lordship, consisting of demesnes and services, held of the Crown *in capite*, with a civil and criminal jurisdiction; and it is declared by *magna charta*, c. 2. that the ancient relief of an earl, *de comitatu integro*, was a hundred pounds.

43. The possessions of an earl were frequently called honours, as well as those of barons. When they came into the hands of the King by forfeiture or escheat, they were distinguished from the ancient possessions of the Crown, by the name of *honores comitum*. So where a new earl was created of such a forfeited or escheated earldom, the possessions were usually granted to him by the name of *honor comitatus*; and in the charters of creation of earls, a clause was frequently inserted, enabling them to hold all, or a

part of their estates, and also their future acquisitions, *sub comitali honore* ; by which those lands became parcel of their earldoms.

44. The dignity of duke was also originally annexed to the possession of lands, for when King Edward I. created the Black Prince Duke of Cornwall, he gave him a charter, by which he granted to him the name and honour of Duke of Cornwall, the office of sheriff of Cornwall, together with several manors and franchises in Cornwall, and in other places, which are erected into a duchy. Seld. Id. § 29.

45. Dignities by tenure are saved by the stat. 12 Ch. II. c. 24. § 11. whereby it is declared, that nothing in that act “shall infringe or hurt any title of honour, feudal or other, by which any person had or might have a right to sit in the Lords House of Parliament, as to his or their title of honour, or sitting in parliament, and the privileges belonging to them as peers.”

46. Dignities appear in some cases to have been so inseparably annexed to certain estates, that they have descended to an heir male, when entitled to those estates under an entail, in preference to an heir general. Cases where Dignities have gone with Lands.

47. Upon the death of Thomas Lord Berkeley in 5 Hen. V. it was found by inquisition, that the castle and manor of Berkeley were entailed by the grandfather of the deceased, by a fine levied in 23 Edw. III., on himself and the heirs male of his body ; and as the deceased left only a daughter, they descended on James de Berkeley, as cousin and next heir male to the deceased. Dugdale observes, that this James, by virtue of the said entail, enjoyed the castle and barony of Berkeley ; and was summoned to parliament in Dugd. Bar. v. 1. 361.

9 Hen. V. and to all the parliaments that were held in the time of King Henry VI.

Id. 363. 48. William Lord Berkeley having no children, by an indenture in 3 Hen. VII. covenanted to assure the castle and manor of Berkeley, for want of issue of his own body, unto King Henry VII. and the heirs male of his body, and for default of such issue, to his own right heirs; and settled the same accordingly. In consideration of this, he obtained the office of earl marshal, and the dignity of a marquis, to himself and the heirs male of his body. This William Lord and Marquis of Berkeley dying without issue, and the castle and manor of Berkeley having thereby vested in the Crown, Maurice de Berkeley, the brother and heir of William, never had or enjoyed the barony of Berkeley; but having recovered several other estates belonging to the family, he died in 22 Hen. VII. leaving issue Maurice his eldest son, who was summoned to parliament in 14 Hen. VIII. But he had not the place of his ancestors, in regard that the castle of Berkeley, and those lordships belonging thereto, which originally were the body of that ancient barony, then remained in the Crown by virtue of the entail: he therefore sat in parliament, merely as a new baron, in the lowest place, of which, says *Dugdale*, he had no joy, considering the eminency of his ancestors, and the precedence which they ever had; though in point of prudence he was necessitated to submit, being thereunto persuaded by his counsel. Upon the death, however, of King Edw. VI. who was the last heir male of King Henry VII., the reversion of Berkeley castle, and the other estates given to that King, fell into the possession of Henry de Berkeley, as right heir of William Lord and Mar-

quis of Berkeley; in consequence of which he was summoned to parliament in 4 Phil. and Mary, and was seated in the place of the ancient Barons of Berkeley. Journ.
v. 1. 616.

49. Thomas de Beauchamp Earl of Warwick, by a fine levied in 18 Edw. III., settled the castle and manor of Warwick, with divers others possessions, on himself for life, remainder to Guy his eldest son, and the heirs male of his body; remainder to Thomas his second son, and the heirs male of his body. Guy died without issue male, leaving two daughters: afterwards Thomas the settlor died; upon which Thomas his second son entered into the castle and manor of Warwick, and was Earl of Warwick, by reason of the aforesaid entail. Seld. Id. § 11.
Collins, 115.

50. It appears from the Rolls of Parliament, 11 and 12 Hen. VI., that John Lord Maltravers claimed to have place in parliament as Earl of Arundel; considering that his ancestors Earls of Arundel, as lords of the castle, honour, and lordship of Arundel, had their place in parliament, time out of mind, by reason of the said castle, honour, and lordship, to which the said name and title of an earl had been annexed; and showed that he was then seised of the said castle, honour, and lordship. The Duke of Norfolk, who was then a minor, presented a petition, showing that the said castle and dignity belonged to him by inheritance. The counsel of Lord Maltravers exhibited his title to the castle of Arundel, under a special entail. And after mature deliberation it was resolved, that Lord Maltravers was entitled to sit in parliament as Earl of Arundel, and in the ancient place of those earls. Rot. Parl.
v. 4. 441.
Dugd. Bar.
v. 1. 322.

51. It also appears from the Rolls of Parliament, 27 Hen. VI., that in consequence of a dispute be- Rot. Parl.
v. 5. 148.

Dugd. Bar.
v. 1. 323.

tween the Earls of Arundel and Devon, respecting their precedence, the Judges declared that the Earl of Arundel was seised of the castle, honour, and lordship of Arundel, whereto the name, estate, and dignity of Earl of Arundel was, and time out of mind had been united and annexed; and by that reason he bore and had that name, and not by way of creation. Whereupon it was determined that the said Earl of Arundel should retain his pre-eminence, by reason of the said castle, honour, and lordship of Arundel, as worshipfully as any of his ancestors Earls of Arundel, above the said Earl of Devon and his heirs.

Vincent on
Brook, 560.

52. The castle and honour of Arundel descended to Henry Fitzallan, who settled the same on his grandson, Philip Howard, the eldest son of Thomas Duke of Norfolk, who was attainted of high treason and beheaded in 1572. This Philip Howard, by reason of the possession of the castle and honour of Arundel, was summoned to parliament as Earl of Arundel in 23 Eliz., and appears by the Journals to have sat in the place of the ancient Earls of Arundel.

Barony of
Abergavenny,
Collins, 61.

53. Sir Thomas Fane having married Mary the only daughter and heir of Henry Lord Abergavenny, claimed that barony in 1604, and showed that King Richard II. caused a writ of summons to be directed to Sir William Beauchamp, to attend his parliament at York, where he appeared and sat as a baron. That the said dignity descended to Edward Nevill the father of the said Mary; who therefore, as his heir general, became entitled to the dignity.

Edward Nevill, who was the nephew and heir male of the last Lord Abergavenny, claimed the dignity under the will of George Lord Bergavenny, made in 27 Hen. VIII.; by which he entailed the barony of

Abergavenny, with all other his castles, lordships, honours, &c. on himself and the heirs male of his body, remainder to Sir Edward Nevill and the heirs male of his body; and deduced his pedigree as heir male of the body of Sir Edward Nevill, to whom the estates so entailed had descended, by the failure of heirs male of George.

The case was referred to, and argued in the House of Peers for seven days. Serjeant Doddridge, who was counsel for Sir Edward Nevill, stated the question to be, whether the barony of Abergavenny, with the title and dignity, was descended unto the lady, being the daughter and heir of the last baron of Abergavenny; or unto the special heir male, to whom the castle of Abergavenny, being anciently the head of the barony, was descended. Wherein two things were to be considered—First, whether within the realm of England there were any baronies by tenure; and whether *baronia sit dignitas annexa feodo*; viz. Whether the heir male, having the castle holden *per baroniam*, should have the title; or the heir general, who had not the castle?

Secondly, whether by former precedents it might be shown that this barony had been guided by the lawful descent of the castle of Abergavenny; or whether the same had gone to the heirs general, sundered from the castle.

Those who denied the existence of baronies by tenure objected—First, that if there were any, then the grantee of them must hold by the same tenure as the feoffor, but that was *per baroniam*; and therefore if such grant were made to persons ignoble, they then would be noble, which was absurd.

Secondly, it was evident that many manors which in former times were holden *per baroniam*, were then

in the possession of mean persons, who never claimed the title of baron.

Thirdly, that there were some ancient barons, who had sold their castles, and yet retained their dignities.

To these objections the Serjeant answered, first, that if a baron by tenure aliened without licence, he forfeited his estate, which was seised by the King ; and so the dignity was extinguished. If he aliened with licence, such alienation was made, either for the continuance of the dignity in his blood, by entailing it to some branch of his family, or to a stranger. In the first case he mentioned several instances where the dignity was allowed to pass, and be enjoyed by the alienee, particularly those of the earldoms of Warwick and Arundel, and the barony of Berkeley. In the second case he mentioned several instances where the alienee had borne the name and had the dignity of a baron, in respect of such barony so aliened : and where such alienee had no dignity before, he had, in respect of that, been summoned to parliament, and enjoyed the dignity.

To the second objection he answered, It was true that ancient baronies were then in the hands of men ignoble ; but the reasons were twofold : 1. Because they had been aliened by licence to them. 2. Because such manors had come to the Crown by way of reversion, escheat, or forfeiture, and were granted again, reserving other services.

As to the third objection, that ancient barons had aliened their castles, and still retained their dignities, he answered, that such baronies were created by writ, in which the persons summoned were named by the principal places of their abode ; therefore, though they had aliened their castles or manors,

Vide Collins,
113.

ante.

infra, c. 2.

from which they were named, yet they retained their dignities.

The Serjeant then proceeded to show that the castle and manor of Abergavenny were originally granted to be holden *per baroniam, sive*, grand serjeanty: that the barony was a very large seigniory, and had petty barons holding thereof; and that the title and dignity had *de facto* gone with the castle.

It is said in the Journals,—“ That the question Vol. 2. 345. seemed nevertheless not so perfectly and exactly resolved, as might give clear and undoubted satisfaction to all the consciences or judgements of all the Lords, for the precise point of right; and yet so much was shown and alleged on each part, as in the opinion of the House (if it might stand with the King's good pleasure and grace) made them both capable and worthy of honour. It was therefore moved, and so agreed, that information should be given unto the King's Majesty of all the proceedings of the said Court in this matter; and that humble suit should be made to His Majesty from the Lords for the ennobling of both parties, by way of restitution; the one to the said barony of Bergavenny, and the ancient place belonging to the same; and the other to the barony of Le Despencer.”

King James agreed to the proposal of the House, but nevertheless required the Lords to proceed to determine upon which of the said candidates the dignity of the barony of Bergavenny should in their judgement be settled. The question was proposed by the Lord Chancellor, whether the heir male should have the dignity of Bergavenny; and it was resolved, by the greater number of voices, for the heir male; that Nevill should be restored to the barony of Bergavenny, and settled therein. A writ of summons was

in consequence issued to Edward Nevill, and he took his seat in the House as Baron Bergavenny.

Barony of
Roos.

54. The last case in which a barony by tenure was endeavoured to be established, was that of Roos or Ros, of Hameslake, Trusbutt, and Belvoir. A claim had been made by Lady Henry Fitzgerald, in 1805, to a coheirship in the barony of Roos; as a barony originally created by a writ of summons in 49 Hen. III., directed *Roberto de Ros*; from whom it descended, through a female heir, to the family of Manners, afterwards created Earls and Dukes of Rutland. Lady Henry Fitzgerald claimed to be one of the coheirs of Lady Frances Manners, who was one of the two daughters and coheirs of John the fourth Earl of Rutland. The claim was opposed by the Duke of Rutland; who stated that Robert de Ros was seised of the manors of Hameslake, Trusbutt, and Belvoir, each of which was held of the Crown *in capite per baroniam*, and also of the manor of Ros or Roos, in Holderness, (which was not a barony at the time when the writ of summons was issued to him,) and therefore the writ did not operate as a creation of a new barony, but as a recognition of an ancient baron, in right of those baronies which he then held: and as the honour and castle of Belvoir, which was one of those baronies, continued from that time in the duke's family, and was then in his possession, by descent, the barony of Roos was annexed to that honour and castle.

The Attorney General (Sir A. Piggot) observed, that the Duke of Rutland's counsel had stated an argument to this effect: that the writ which was addressed in 49 Hen. III. to Robert de Ros, created a barony by tenure; if at the time when the writ issued, it could be shown that Robert de Ros had any

barony in him. That this argument would make every writ create a barony by tenure, if it could be shown that at the time when the writ issued, the person to whom it was addressed had any barony in him; without a reference to any word in the writ which connected the person with the tenure. That the Committee of Privileges was to take the writ, in which there was no reference to any castle or barony, and to inquire, *dehors* the writ, whether the person had any barony; and if he had, then to turn that, contrary to the universal construction that had prevailed, into a territorial dignity.

The claim was rejected.

55. It appears to have been always the practice, whenever our monarchs were desirous of convening a *magnum* or *commune concilium*, to call for the attendance of their nobility by writs of summons, addressed to each of them. In consequence of an article in *magna charta*, particular writs were only sent to the *barones majores*. But after the law mentioned by Camden, that none but the great barons, and such others as were summoned by the King's writ, should come to parliament, the Crown assumed the prerogative of sending writs of summons to persons who were not possessed of baronies, by virtue of which they were seated among the peers, and acquired the dignity of barons.

Dignities by Writ.

ante, § 15.

56. This mode of creating dignities is supposed to have been first adopted by King Henry III.; for, in consequence of the barons' wars, a great number of the ancient nobility were destroyed; therefore, when a parliament was summoned after the death of Montfort, writs of summons were sent to several persons not possessed of land baronies, who thereby became barons.

Dugd. Sum. Preface, Collins, 118.

Id. § 22.

ante.

57. Selden observes, that in consequence of this practice, barons became divided into two sorts: barons by writ and tenure, and barons by writ only. Barons by writ and tenure were such as, having the possession of ancient baronies, were called by several writs to parliament, according to that clause in *magna charta* which relates to the *barones majores*. Barons by writ only, were such as were called by the like writ of summons, though they had not land baronies: or where barons by tenure had aliened their possessions, retaining their ancient place and dignity, they became by such alienation barons by writ only.

A dignity by writ is therefore where the Crown issues a writ of summons to a person who is not a peer, or tenant *per baroniam*, requiring him to come and attend parliament, there to consult with the peers of the realm on certain public matters.

The Person
summoned
must sit.

58. A writ of summons has not the effect of conferring a dignity on the person summoned, till he has actually taken his seat in parliament. So that where a person was summoned to parliament by writ, and died before the parliament met; it was resolved that he was not a peer.

Lord Aberga-
venny's Case,
12 Rep. 70.
1 Inst. 16 b.

59. A question arose in the parliament holden in 8 James I., whether Edward Nevill, who was called by writ to parliament in 2 & 3 Mary, and died before the parliament met, was a baron or not. And it was resolved by the Lord Chancellor, the two Chief Justices, the Chief Baron, and divers other Justices there present,—“That the direction and delivery of the writ did not make him a baron or noble, until he came to parliament, and there sat according to the commandment of the writ; for until that, the writ did not take its effect. And in 39 Hen. VI. he is called a peer of parliament, which he cannot be until

he sits in parliament; and he cannot be of the parliament until the parliament begin: and forasmuch as he hath been made a peer of parliament by writ, (by which implicitly he is a baron) the writ hath not its operation and effect until he sit in parliament, there to consult with the King, and the other nobles of the realm; which command, by his *supersedeas*, may be countermanded; or the said Edward Nevill might have excused himself to the King; or he might have waived it, and submitted to his fine: as one who is distrained to be a knight, or one learned in the law is called to be a serjeant; the writ cannot make him a knight or a serjeant. And when one is called by writ to parliament, the order is, that he be apparelled in his parliament robes; and his writ is openly read in the Upper House, and he is brought into his place by two lords of parliament, and then he is adjudged, in law, *inter pares regni* *."

60. The proof of a sitting in parliament, by virtue of a writ of summons, must be by the records of parliament: for Lord Coke says, if issue be joined in any action, whether a person be a baron, &c. or not, it shall not be tried by a jury, but by the records of parliament. 1 Inst. 16 b.

61. The ancient records or rolls of parliament seldom contain proof of the sitting in parliament of any lord. No lists of the peers who attended are to be found in them, nor are the names of any of the peers who were present mentioned, except where they are appointed triers of petitions, or appear to have acted in some particular situation.

* There is an instance of a person's taking his seat by proxy. Vide Camden's Ann. anno 1597.

62. The printed Journals of the Lords contain lists of all the peers who attended; and though not, in strictness, records, they have been admitted by the House, in all modern cases, as sufficient evidence of a sitting.

Are hereditary.

63. Although writs of summons to parliament, whether addressed to persons never summoned before, or to ancient barons, for in both cases the writs have in general been exactly similar, do not contain any words of limitation, except in one instance, which will be mentioned hereafter; yet it appears to have been long settled, that where a person has been summoned to parliament by the usual writ, and takes his seat in the House of Lords by virtue of such writ, he acquires the dignity of a baron, not only for himself, but also for all his lineal descendants, both male and female.

1 Inst. 9 b.
16 b.

64. Lord Coke was clearly of this opinion, having laid it down as fully settled in his time, that where a person was summoned to parliament by writ, and took his seat under such writ, his blood was ennobled to him and his heirs lineal.

65. This doctrine has, however, been controverted by Mr. Prynne, in his *Plea for the Lords*, and in his *Register of Parliamentary Writs*; by Mr. Elsynge, in his *Manner of holding Parliaments*; and by Mr. West, in his *Inquiry into the Manner of creating Peers*. The substance of their arguments may be thus reduced.

infra.

66. 1st, They observe, that in the writs of summons to parliament, neither the words *baron*, *barony*, nor *heirs*, are to be found. And as the King cannot, by his letters patent, create any man a baron or peer, in fee or in tail, without express words of creation and limitation in the patent, for that purpose; and

as in all the patents that passed from the 20 Hen. VIII., there was not only a special clause inserted for creating the patentee's barons, but also for enabling them and their heirs, or the heirs of their bodies, to hold and possess a seat and place in parliament; it seemed equally necessary, that special words of limitation should be inserted in writs of summons, to persons who were not at the time peers of parliament: such as was practised in the case of Henry Bomflete, who being summoned to parliament in 27 Hen. VI., this clause was inserted in his writ,—*Volumus enim vos et* ^{1 Inst. 96.} *heredes vestros masculos de corpore vestro legitime exeuntes Barones de Vescy existere.*

67. 2d, It was a known rule of law, that the King's grants could not enure to two intents, especially when one of them was clearly expressed, and the other not. Now if a writ of summons did create any person a baron or peer, it operated by way of grant; which must be by the implication of an intent, not only not expressed, but perfectly foreign to that which was, and therefore at least in every thing but a writ of summons, could be, in law only intended: for the intention of the King, clearly expressed in the writ, was not to create the person summoned a baron, but only to consult and treat with him concerning the affairs of the nation; which certainly might be done without his being a baron.

68. 3d, If a writ of summons alone ennobled the person to whom it was addressed, and his descendants, then were all the Judges, the King's Serjeants at Law, the Masters in Chancery, and several other persons ennobled; for they received writs of summons, nearly similar at one time, and exactly similar at another, to those that were issued

to the earls and barons, and attended parliament in pursuance of those writs; yet they never claimed to be peers.

69. 4th. It appeared, from the lists of the ancient writs of summons, that during the reigns of the three Edwards, some persons received writs of summons only once, some twice, and some during their lives; but none were sent to their descendants.

70. It would perhaps be impossible to give a satisfactory answer to the arguments above stated, nor has it hitherto been attempted. It must, therefore, be admitted, that something more than a writ of summons, and a sitting, was formerly necessary to create an hereditary dignity.

71. Mr. Elsynge was of opinion, that investiture of robes was necessary to ennoble a person summoned by writ. And this idea is strongly confirmed by the resolution of the Judges in Lord Abergavenny's case.—“And when one is called by writ to parliament, the order is, that he be apparelled in his parliament robes; and his writ is openly read in the Upper House, and he is brought into his place by two lords of parliament, and then he is adjudged, in law, *inter pares regni*.”

ante, § 59.

72. But however strong the objections to Lord Coke's doctrine may appear, there can be no doubt but that it was fully settled, when he wrote, that a writ of summons to parliament, and a sitting in pursuance thereof, as a peer, except in the case of a spiritual person, operated as a creation of a dignity, descendible to the lineal heirs, or heirs of the body of the person so summoned; and this point has been confirmed by so many subsequent decisions, that it is not now to be shaken.

Vide infra,
ch. 3.

73. It has been a very ancient practice to call up the eldest sons of earls to the House of Lords by writ of summons, by the name or title of a barony vested in their fathers. In all which cases they have been allowed to take their place in parliament, according to the antiquity of the barony, by the name of which they were summoned.

Of Writs to
the eldest
Sons of
Peers.

74. Dugdale, at the end of his *Summons to Parliament*, has given a list of those eldest sons of peers who had been summoned in this manner. The first of these was Thomas Arundel, Lord Maltravers, eldest son to Richard Fitzallan, Earl of Arundel, in 22 Edw. IV. In 16 Cha. I., Henry Howard, eldest son of the Duke of Norfolk, was called up to the House of Lords, by writ of summons, by the title of Lord Mowbray, which was the most ancient title of the Norfolk family, and was placed first upon the barons bench.

75. This practice has been adopted in all other similar cases ; and it has been determined, that a writ of summons of this kind creates a dignity, which is hereditary in the blood of the person so summoned.

infra, c. 3.

76. It has been stated, that all dignities by tenure were created by charter, containing a grant of the lands to which the dignity was annexed. Dignities, as personal honours, have also been created in early times by royal charter, of which Selden has published several.

Dignities by
Charter.

77. We find in the *Rolls of Parliament*, that in 36 Edw. III. the Chancellor declared to the parliament the King's intention to honour such of his sons as were of full age. That his son Lionel, who was then in Ireland, should be Duke of Clarence ; his son John, Duke of Lancaster ; and his son

Vol. 2. 273.

Edmund Earl of Cambridge. After which the King did gird his son John with a sword, and set on his head a cap of fur, and upon the same a circlet of pearls and gold, and named him Duke of Lancaster; and thereof gave him a charter. In like manner the King girded his son Edmund with a sword, and named him Earl of Cambridge, and thereof gave him a charter.

Vol. 3. 205.

78. In the Rolls of Parliament, 9 Rich. II., there is an account of the confirmation of a charter, by which that prince had granted to his uncle, Edmund Earl of Cambridge, the dignity of Duke of York. The charter is recited. of which the operative words are; —*In ducem creximus, eidem ducatus Eborum titulum assignantes, et nomen.* And the King, with the consent of Parliament, confirmed it, and invested him with the dignity, by delivery of the charter; girding him with a sword, and putting on his head a cap of honour, and a circlet of gold, or coronet.

By Letters
Patent.

1 Inst. 16 b.
Seld. Id. § 28.

79. In the time of King Richard II. it became a practice to create dignities by letters patent under the great seal; the first instance of which is said to have been in the eleventh year of that Prince's reign; when John Beauchamp de Holt was created Lord Beauchamp by letters patent. "Before whom (says Lord Coke) there was never any baron created by letters patent, but by writ." Therefore, whenever a barony appears to have existed before the 11 Rich. II., it must be taken to be either a barony by tenure or by writ.

80. In all letters patent, by which a dignity is created, there is a clause of investiture, similar to that contained in the ancient charters. And Dugdale

says, the solemn investiture of barons created by letters patent, was performed by the King himself, by putting on the new baron a robe of scarlet, and a hood furred with minever. This form continued till the 13 James I., when the lawyers declared that the delivery of the letters patent was sufficient, without any ceremony.

Bar. Vol. 2.
195.
Collins, 122.
Append.
No. 5.

81. In the case of letters patent, the creation of the dignity is perfect and complete, as soon as the great seal is put to the patent. Therefore, although the grantee should die before he takes his seat, yet the dignity will descend to his posterity.

12 Rep. 71.

82. Henry Waldegrave being created Baron Waldegrave by letters patent, 1 James II., to him and the heirs male of his body, but dying before he sat in parliament, his eldest son was introduced in his robes, and took his seat. The present Lord Walsingham took his seat under the same circumstances.

Journ.
Vol. 21. 682.

83. It is laid down by Lord Coke, that where a person is created a peer by letters patent, the state of inheritance must be limited by apt and proper words, or else the grant is void. The usual limitation is to the heirs male of the body of the first grantee. In some it is confined to heirs male by a particular person: and in some, the dignity is limited, in default of heirs male, to the eldest heir female.

1 Inst. 16 b.
12 Rep. 71.

Vide infra,
c. 3.

84. Where a man possessed of a dignity marries, his wife becomes entitled to the same during her life, unless she afterwards marries a commoner; in which case she loses the dignity. If a woman be noble by birth, whosoever she marries, she remains noble; for birthright is *character indelibilis*.

By Marriage.

Journ.
Vol. 15. 241.
1 Inst. 16 b.
6 Rep. 53 b.

On whom
Dignities can
be conferred.

85. The Crown may confer a dignity on any person. And though it was formerly resolved by the House of Lords, that a person who was a peer of Scotland could not be created an English peer, yet that is now altered.

Whether
they can be
refused.
4 Inst. 44.

86. It seems doubtful whether a person can refuse or waive a dignity. Lord Coke says, "If the King calleth any knight or esquire to be a lord of parliament, he cannot refuse to serve the King there, *in illo communi consilio*, for the good of his country." And in Lord Abergavenny's case, the Judges appear to have been of that opinion.

ante.

1 P. Wms.
592.

87. This doctrine is contradicted by Lord Chancellor Cowper, who held that the King could not create a subject a peer of the realm against his will; because it would be then in the power of the King to ruin a subject, whose estate and circumstances might not be sufficient for the honour. He also held, that a minor might, when of age, waive a peerage granted to him during his minority.

Idem.

88. Lord Trevor was of a different opinion, and held, in conformity with Lord Coke, that the King had a right to the services of his subjects, in any situation he thought proper: and instanced in the case of the Crown's having power to compel a subject to be a sheriff; and to fine him for refusing to serve. He observed, that in Lord Abergavenny's case, it was admitted the King might fine a person whom he thought proper to summon to the House of Peers; it being there said, that a person might choose to submit to a fine: and if it were allowed the King might fine one for not accepting the honour, and not appearing upon the writ; the King might fine, *toties quoties*, where there was a refusal, and consequently

might compel the subject to accept the honour. That it was not to be presumed the King would grant a peerage to any one to his wrong, any more than he would make an ill use of pardoning ; all which were suppositions contrary to the principles upon which the constitution was framed, which depended upon the honour and justice of the Crown.

TITLE XXVI.

DIGNITIES.

CHAP. II.

Of the Estate which may be had in a Dignity.

- | | |
|---|--|
| 1. Dignities are Real Property. | 33. Dignities forfeited by Attainder. |
| 4. What Estate may be had therein. | 38. Where entailed not forfeited for Felony. |
| 6. May be entailed. | 40. Corruption of Blood. |
| 9. With a Remainder over. | 42. Does not extend to entailed Dignities. |
| 10. Or granted for Life. | 44. Restitution of Blood. |
| 11. Not subject to Curtesy. | 48. A Dignity may be lost by Poverty. |
| 18. Cannot be aliened. | 51. Not within the Statutes of Limitation. |
| 24. Nor surrendered to the King. | |
| 26. Nor extinguished by a new Title. | |
| 29. An Earldom does not attract a barony. | |

SECTION 1.

Dignities are
real Property.

ALL dignities having been originally annexed to lands, were considered as incorporeal hereditaments, wherein a person might have a freehold estate. And although dignities are now become little more than personal honours; yet they are still classed under the head of real property.

2. In conformity to this principle it was formerly held that a dignity must have been created of some particular place, in order that it might appear to be annexed to land, and thereby become a real hereditament. But Lord Holt was of opinion that this is not now necessary.

3. Where a person is created a baron of a particular place, that place, though a family mansion, does

1 Inst. 20 a.
1 Ld. Raym.
10.

not thereby become the *caput baroniæ*, so as to exclude a widow from being endowed of it.

Thomas Gerard having been created Lord Gerard of Gerard's Bromly, by letters patent, he being then resident in the said capital messuage, a question arose in a writ of dower, brought by the widow of a Lord Gerard, whether the said capital messuage became thereby *caput baroniæ*. It was resolved that it did not, because it was not a feudal barony; for the authorities cited must be intended of feudal baronies; and this privilege was allowed to them, because they ought, upon necessity, to defend the realm, to which they were bound by tenure. For the King, at the creation of the barony, gave to the baron lands and rents, to hold of him for the defence of the realm. Then this could not be a feudal barony, for it was in the seisin of the Gerards before; therefore was not given to the Gerards by the King, at the creation of the barony. The widow recovered dower.

Gerard v. Gerard,
5 Mod. 64.
12 — 84.
3 Lev. 401.

1 Ld. Raym.
72.

4. While dignities were annexed to lands, the persons seised of those lands, if tenants in fee simple, must have had the same estate in the dignity; and a person might also have a qualified fee in the dignity, as appears from the case of John Talbot; ante. which has been already stated.

What Estate may be had therein.

5. As to dignities created by writs of summons, Lord Coke says — "And it is to be observed, that if he be generally called by writ to parliament, he hath a fee simple in the barony, without any words of inheritance." This expression is inaccurate; and Lord Coke has corrected it in the same page, by adding, "and thereby his blood is ennobled to him and his heirs lineal."

1 Inst. 16 b.

Dignities of this kind being descendible to females, have generally been called baronies in fee ; but this is not strictly so, for they are descendible only to the lineal heirs of the person first summoned.

infra, c. 3.

May be entailed.

Nevill's Case, 7 Rep. 33.

6. A dignity may be entailed within the statute *De Donis*, for it concerns land. Thus, it was resolved by all the Judges in 7 James, that where Ralph Nevill was, by letters patent, created Earl of Wesmoreland, to him and the heirs male of his body, an estate tail was thereby raised ; and not a fee conditional at common law.

1 Inst. 20 a. 12 Rep. 81.

Lord Coke says, a name of dignity may be entailed within the statute, as dukes, marquesses, earls, viscounts, and barons ; because they are named of some county, manor, town, or place.

7. A dignity may not only be entailed at its first creation, but also a dignity originally descendible to heirs general may be entailed, by an act of parliament, upon the heirs male of the body of the person seised thereof.

Earldom of Oxford.

8. Robert de Vere, Duke of Ireland and Earl of Oxford, was attainted in 11 Rich. II. by parliament. And in 16 Rich. II. that prince, by assent of parliament, restored to Aubrey de Vere, and his heirs male for ever, the estate and honour of Earl of Oxford.

Collins, 173. W. Jones, 96.

In the year 1626, a contest arose, in consequence of the death of Henry de Vere, Earl of Oxford, respecting the right to that earldom, between Robert de Vere, claiming under the entail, created by the act 16 Rich. II. as heir male of the body of Aubrey de Vere, and Lord Willoughby of Eresby, claiming as heir general to the last earl.

The case was referred by King Charles I. to the House of Lords, who called to their assistance Lord Ch. Just. Crew, Lord Ch. Baron Walter, Doddridge,

and Yelverton, Justices; and Baron Trevor. Their opinion on this point was delivered by Lord Chief Just. Crewe; whose exordium is so eloquent, that it shall be transcribed.

“ This great and weighty cause, incomparable to any other that hath happened at any time, requires great deliberation, and solid and mature judgement, to determine it; and I wish that all the Judges of England had heard it, (being a case fit for all) to the end we altogether might have given our humble advice to your Lordships herein. Here is represented to your Lordships *certamen honoris*, and, as I may well say, *illustris honoris*, illustrious honour. I heard a great peer of this realm, and a learned, say, when he lived, there was no King in Christendom had such a subject as Oxford. He came in with the Conqueror Earl of Gwynes: shortly after the Conquest made Great Chamberlain of England, above 500 years ago, by Henry I., the Conqueror’s son, brother to Rufus: by Maud the Empress, Earl of Oxford: confirmed and approved by Henry Fitz-Empress, Henry II. *Alberico comiti*, so earl before. This great honour, this high and noble dignity, hath continued ever since in the remarkable surname of De Vere, by so many ages, descents, and generations, as no other kingdom can produce such a peer, in one and the selfsame name and title. I find, in all this length of time, but two attainders of this noble family, and those in stormy and tempestuous times, when the government was unsettled, and the kingdom in competition. I have laboured to make a covenant with myself that affection may not press upon judgement; for I suppose there is no man that hath any apprehension of gentry or nobleness, but his affection stands to the

continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it. And yet time hath his revolutions : there must be a period and an end to all temporal things—*finis rerum* ; an end of names and dignities, and whatsoever is terrene, and why not of De Vere. For where is Bohun ? Where is Mowbray ? Where is Mortimer ? Nay, which is more and most of all ; where is Plantagenet ? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of De Vere stand so long as it pleaseth God."

The Lord Chief Justice and his brethren were unanimously of opinion, that although the earldom of Oxford was originally held in fee simple by the family of De Vere, yet " that the honour of the said earldom of Oxford was entailed upon Aubrey De Vere and his heirs male by the parliament of 16 Rich. II. ; and that an estate therein to the heirs male was sufficiently raised and created thereby ; and was so reputed and enjoyed by many descents of the earls ; which could not have been (as the same was limited) if the same had only been an ordinance of parliament : and that the said honour descended and then of right belonged to Robert De Vere, as heir male of the said Aubrey, by virtue of the entail."

Journ. v. 3.
537.

The House of Lords resolved accordingly, and the next day Robert De Vere took his seat as Earl of Oxford.

With a Remainder over.

7 Rep. 33.

9. An estate in remainder may be limited in a dignity, to commence after the determination of a preceding estate tail. Thus the earldom of Northumberland was granted to Thomas Percy and the heirs male of his body ; and for default of such issue, to Hugh his brother, and the heirs male of his body.

10. Lord Coke says, the King may create either a man or a woman noble for life; but not for years; because then it might go to executors or administrators. Or granted for Life.

There are several modern instances of dignities granted to a person for life, with a remainder over to other persons; such as the cases of the late Duke of Northumberland and the late Duke of Montague.

11. While dignities were annexed to the possession of particular castles, manors, &c., the husband of a woman seised of such castles, &c. was bound to perform the services due to the Crown for them; and among others to attend parliament: so that he enjoyed the dignity during the joint lives of himself and his wife. Not subject to Curtesy.
Dugd. Sum. Preface.

12. Monthermer, who married the Duchess Dowager of Gloucester, was summoned to parliament in 27 Edw. I. as Earl of Gloucester, and to all succeeding parliaments during her life: when she died, her son became Earl of Gloucester, and Monthermer was summoned as a baron. Idem.
Vin. on Brooke.
12 Rep. 112.

13. Where there was issue, the husband became tenant by the curtesy of the dignity. Thus Lord Coke mentions a case in the reign of Hen. VI., where a person was allowed to hold the dignity of Earl of Salisbury, as tenant by the curtesy, in right of his wife Alicia, the daughter and heir of the preceding earl, by whom he had issue. 1 Inst. 29 b.

14. In the reign of King Henry VIII., Mr. Wymbish having married a lady entitled to the dignity of Taylboys, a question arose, whether he ought to have the name of Lord Taylboys, in right of his wife, or not. The King consulted the two Chief Justices, Doctor Gardiner Bishop of Winchester, and Garter. First, the King demanded of the two Chief Justices,

whether, by law, Mr. Wymbish ought to have the name of Lord Taylboys, in right of his wife, or not. They answered, that the common law dealeth little with the titles and customs of chivalry; but such questions had always been decided before the constables and marshals of England. Then the King moved the questions to Doctor Gardiner, who answered, that by the law which he professed, dignity was denied, both to women and to Jews. I like not that law, quoth the King, that putteth Christian women and Jews in the same predicament. That law, said Doctor Gardiner, as I take it, is to be intended of dignity, whereunto public office is annexed: for in France women succeed as well to their ancestors in dignities, as in patrimonies; therefore the custom of every region is to rule those things. Then the King asked Garter of the custom of England, who answered, that it had been always used so in England as in France, that the husband of a baroness by birth should use the stile of her barony, so long as she lived; and if he were tenant by the curtesy, then that he might use it for term of his life. The Chief Justice confessed that custom concerning the tenant by the curtesy to be consonant to the common law; for the common law admitted him to all his wife's inheritances, of which she was seised during the coverture, and that might descend to their issue; and the dignity was parcel of the inheritance: which Doctor Gardiner confessed; adding, that the law granting the more, which was the possession of the barony, could not be intended to deny the less, which was the dignity; a thing incident to it.

As it standeth with law, said the King, that tenants by curtesy should have the dignity, so it standeth with reason: but I like not that a man should be this

day a lord, and to-morrow none, without crime committed; and it must so fall out in the husband of a baroness, if she die having never had by him any children.

The Chief Justice confirmed, that in that point the common law dissented not much from the King's reason; for the husband that never had issue, was thought to have no interest in law in his wife's inheritance, more than in respect only that he was a husband; but having a child, then he acquired a state in law, and was admitted to do homage, and not before.

The King, for resolution, said, that forasmuch as by their speeches he understood that there was no force of reason or law to give the name to him that had no issue by his wife; that neither Mr. Wymbish, nor none other, from thenceforth, should use the style of his wife's dignity, but such as, by curtesy of England, had also right to her possessions, for term of his life. The which opinion the persons aforementioned applauded; and so the sentence stood.

15. Notwithstanding this recognition of the doctrine of curtesy in dignities, the claim of Richard Bertie in 1580 to the barony of Willoughby, in right of his wife Catherine Duchess of Suffolk, as tenant by the curtesy, was rejected; and Peregrine Bertie her son was admitted, in the lifetime of his father.

16. Mr. Hargrave has observed, that two other ^{1 Inst. 29 b.} claims of a like kind were made in a few years after, ^{n. l.} but were not determined; and he could not learn that there had been any claims of dignities by curtesy since Lord Coke's time. And from the want of modern instances of such claims, as well as from some late creations, by which women were made peeresses, in order that the families of their husbands might have

titles, and yet the husbands themselves remain commoners, it seemed as if the prevailing notion was against curtesy in titles of honour. However, he had not discovered whether this great question had ever formally received the judgement of the House of Lords.

17. It may also be observed, that there are some modern instances of persons sitting in parliament as heirs to their mother's dignities, in the lifetime of their fathers, which would not have been allowed if their fathers had an estate by the curtesy in those dignities. Thus the late Duke of Northumberland was allowed to sit in parliament as Baron Percy, immediately upon the death of his mother, though his father was living. In the same manner the late Marquis of Townsend was allowed to take his seat in parliament as Baron Ferrers of Chartley, upon the death of his mother, though his father was alive.

Cannot be
aliened.

18. Dignities by tenure appear to have been formerly alienable; provided such alienation was made with the licence of the Crown.

Ryley, Plac.
Parl. 547—
557.

19. By letters patent, 7 Edw. II., reciting that Edmund Deyncourt (who was Baron Blankeney) having no issue male, and being desirous that his surname and arms might continue, had petitioned His Majesty for leave to enfeoff whom he pleased of his manors and arms. The King granted him his licence to enfeoff any person of his manors, &c. so as the same might remain after his decease to William Deyncourt, and the heirs male of his body. By other letters patent, 10 Edw. II., the King granted him his licence to enfeoff Oliver and John Deyncourt of the manor and soke of Blankeney, &c. : that the said Oliver and John should re-enfeoff the said Edmund of the same, to hold during his life, and after his decease to the said William Deyn-

court and the heirs male of his body. Lord Coke ^{4 Inst. 126.} says, it appears from the Close Rolls that this Edmund sat in parliament until and in 18 Edw. II.: that after his decease his assignee sat in parliament in 1 Edw. III. by the name of William Deyncourt; and in his heirs male the dignity, surname, and possessions continued until 21 Hen. VI., when his heir male, together with the name and dignity, ceased.

20. Lord Coke also says, he heard Lord Burghley ^{Idem.} vouch a record in the reign of Edw. IV., that the Lord Hoe having no issue male, by his deed under his seal, granted his name, arms, and dignity over; but having not the King's licence and warrant, the same was in parliament adjudged to be void.

21. It has been already observed, that dignities by ^{c. 1.} tenure have been frequently settled by the persons in possession of them, upon particular branches of the family of the settlor, in exclusion of others. And the cases of the earldoms of Warwick and Arundel, and baronies of Berkeley and Abergavenny, in which such settlements were held good, have been already stated.

22. When dignities ceased to be annexed to the possession of lands, and came to be considered as mere personal inheritances, the right of alienating them appears to have been gradually taken away: and it became a settled rule, that a dignity was an hereditament inherent in the blood of the first grantee, and his descendants; and was therefore unalienable.

23. In the case of the barony of Grey of Ruthyn, ^{Journ. v. 4. 150.} the House of Lords made the following resolution:—

“Upon somewhat which was spoken of in argument concerning a power of conveying away an honour, it was resolved upon the question, *nemine contra-*

dicente, that no person that hath any honour in him, and a peer of this realm, may alien or transfer the honour to any other person."

Nor surrendered to the King.

24. Dignities might also be surrendered to the King, of which there are several instances. It was however resolved by the House of Lords in 1640,—
"That no peer of the realm can drown or extinguish his honour; but that it descends to his descendants; neither by surrender, grant, fine, nor any other conveyance to the King."

Journ. v. 4. 150.

Viscount Purbeck's Case, Show. Parl. Ca. 1. 1 Collins, 293. Anno 1678. Journ. v. 13. 182.

25. Lord Viscount Purbeck surrendered his dignity to the King by fine: after his death Mr. Villers, his eldest son, petitioned His Majesty for the title. The petition being referred to the House of Lords, it was argued on behalf of the petitioner, that this was a personal dignity annexed to the blood; and so inseparable and immoveable, that it could not be either transferred to any other person, or surrendered to the Crown. It could move neither forward nor backward, but only downward to posterity; and nothing but deficiency, or a corruption of blood, could hinder the descent.

Journ. v. 13. 253.

The Attorney General (Sir William Jones) endeavoured to support the surrender upon the authority of several ancient precedents. The House of Lords resolved,—“Forasmuch as upon debate of the petitioner's case, who claims the title of Viscount Purbeck, a question in law did arise, whether a fine levied to the King by a peer of the realm of his title of honour, can bar and extinguish that title. The Lords spiritual and temporal, in parliament assembled, upon very long debate, and having heard His Majesty's Attorney General, are unanimously of opinion, and do resolve, that no fine now levied, or at any time hereafter to

be levied to the King, can bar such title of honour, or the right of any person claiming under him that levied or shall levy such fine."

26. It appears to have been formerly doubted whether a barony created by writ, was not extinguished by the acceptance of a new barony of the same name. Thus in the case of Lord Delawarre, it was resolved in parliament, 39 Eliz., that a grant of a new barony of Delawarre to William West, who was not then in possession of the ancient barony of Delawarre, did not merge or extinguish the ancient barony, but that if William West had been a baron entitled to, or in possession of the ancient barony, when he accepted the creation, the law, perchance might have been otherwise; but that remained unresolved.

Nor extinguished by a new Title.

11 Rep. 1.
Collins, 122.

27. It seems, however, to have been soon after settled, that the acceptance of a new dignity did not merge or destroy an ancient one; for Lord Coke says — "That the greater dignity doth never drown the lesser dignity, but both stand together in one person: and therefore if a knight be created a baron, yet he remaineth a knight still; and if the baron be created an earl, yet the dignity of a baron remaineth, *et sic de cæteris.*"

2 Inst. 594.

28. In the case of the barony of Willoughby de Broke, it was resolved by the House of Lords, that the grant of a new barony of Willoughby de Broke to Sir Foulk Greville, by letters patent, to him and the heirs male of his body, he being then in possession of the ancient barony by writ, did not destroy such ancient barony, but the same continued and descended to his sister and sole heir, and from her to Sir Richard Verney, who was seated in the House of Lords according to the date of the ancient barony.

Collins, 321;
325.
infra, c. 3.

An Earldom
does not at-
tract a
Barony.
Collins, 162.

29. An opinion formerly prevailed, that where a person having a barony by writ, and consequently descendible to his heirs general, was created an earl, to him and the heirs male of his body; the earldom attracted the barony, so that they could not be afterwards separated.

Collins, 195.
1 Inst. 15 b.
n. 3.

30. This doctrine was fully exploded in the case of the barony of Grey of Ruthyn, in which it appeared that Lord Grey, being a baron by writ, was created Earl of Kent, by letters patent, to him and the heirs male of his body, and had issue two sons, the eldest of whom became Earl of Kent, and died leaving issue a daughter only. It was resolved, that the barony descended to the daughter, and the earldom to the younger brother, and that the earldom did not attract the barony.

Journ. vol. 4.
149.

31. So where the earldom becomes extinct, the barony will notwithstanding descend to the heir general.

Collins, 286.

32. In the year 1669, the claim of Benjamin Mildmay to the barony of Fitzwalter was heard before the King in council, in the presence of the two Chief Justices, Lord Ch. Baron Hale, the King's Chief Serjeant, and the Attorney and Solicitor General. The petitioner deduced his pedigree from Robert Fitzwalter, who was summoned to parliament by writ in 23 Edw. I. and several times after. The title descended to Robert Fitzwalter, who was created Viscount Fitzwalter and Earl of Sussex. This Earl of Sussex had two sons; Henry Earl of Sussex, and Sir Humphrey Ratcliffe. Henry had two sons; Thomas Earl of Sussex who died without issue, and Henry Earl of Sussex, who left one son, Robert Earl of Sussex, and one daughter, Lady Frances, who married Sir Thomas Mildmay, to whom the petitioner was

heir. The counsel on the other side insisted that the barony was merged and extinct in the earldom, by coming to Edward the last Earl of Sussex, who died without issue.

The question being put to the Judges, they unanimously agreed, that "if a baron in fee simple be made an earl, the barony will descend to the heir general, whether the earldom continue or be extinct." With which opinion and resolution His Majesty being fully satisfied, a writ of summons was issued to Mr. Mildmay, under which he took his seat as Baron Fitzwalter.

33. Every kind of dignity is forfeited by the attainder for treason of the person possessed of it, and can only be revived by a reversal of the attainder.

Dignities
forfeited by
Attainder.

34. Charles Nevill Earl of Westmoreland, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament; and died without issue male: upon which Edward Nevill, in 2 Ja. I. claimed to be Earl of Westmoreland, as heir male of the body of the first grantee.

Nevill's Case,
7 Rep. 33.

It was resolved by all the Judges, that although the dignity was within the statute *De donis conditionalibus*, yet that it was forfeited by a condition in law, *tacite* annexed to the estate of the dignity. For an earl has an office of trust and confidence; and when such a person, against the duty and end of his dignity, takes not only council, but also arms against the King, to destroy him, and thereof is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever, by force of a condition in law, *tacite* annexed to their estates. It was also resolved,

Tit. 2. c. 2.
§ 37.

that if it had not been forfeited by the common law, it would have been forfeited by the statute 26 Hen. VIII.

35. Where a person is tenant in tail of a dignity, with remainder in tail to another, and the first tenant in tail is attainted of high treason, the dignity is forfeited, as to him and his descendants; but upon failure of such descendants, it becomes vested in the remainder-man.

7 Rep. 34 a.

36. Thomas Percy, who was Earl of Northumberland, to him and the heirs male of his body, remainder to his brother Hugh Percy, in the same manner was attainted of high treason and executed, having no issue male; upon which Hugh Percy became Earl of Northumberland.

37. A dignity descendible to heirs general is also forfeited by attainder of felony of the person possessed of it.

Where in-
tailed not
forfeited for
Felony.
Tit. 2. c. 2.
§ 43.

38. Where a tenant in tail of a dignity is attainted of felony, the dignity is only forfeited during his life, and after his decease it vests in the person entitled to it, *per formam doni*. For the statute 26 Hen. VIII. does not extend to this case.

Journ. v. 29.
690.

39. Lawrence Earl Ferrers, to whose ancestor the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted and executed for murder, in the year 1760. But having left no issue, the dignity was not forfeited, but descended to his brother Washington Ferrers, who took his seat accordingly.

Corruption
of Blood.

Tit. 29. § 2.

40. In the case of a dignity descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, though the person attainted was never possessed of the dignity,

will bar such claim; for the blood of the person attainted, being corrupted, no pedigree can be derived through him: so that the dignity becomes vested in the Crown by escheat; and is thereby destroyed.

41. In 1723, the Reverend Robert Lumley Lloyd claimed the barony of Lumley, which was created by writ of summons in 8 Rich. II. as heir to Ralph Lord Lumley, the person first summoned to parliament. It appeared that the title had descended to John Lord Lumley, and that George Lumley his eldest son was attainted of treason, and died in the lifetime of his father, leaving issue, John Lumley, who died without issue; and that Spandian Lloyd was his cousin and next heir, viz. eldest son of Barbara Williams, sister of the said John Lord Lumley. That Spandian Lloyd died without issue, and that Henry Lloyd his next brother had issue Henry his eldest son, who was father to the claimant.

Barony of Lumley.

Hale P. C. Pa. 1. 356.

The House of Lords resolved, that the petitioner had not any right to a writ of summons to parliament, as prayed by his petition.

42. In the case of entailed dignities, no corruption of blood takes place. A dignity in tail may therefore be claimed by a son surviving an attainted father, who never was possessed of the dignity. For the son may in such a case claim from the first acquirer, *per formam doni*, as heir male of his body, within the description of the gift, without being affected by the attainder of his father, or any other lineal or collateral ancestor.

Does not extend to entailed Dignities. Tit. 29. c. 5.

2 Hale P. C. 356.

43. In 1764, John Murray presented a petition to His Majesty, stating that his grandfather John Marquis of Athol was by letters patent created Duke of Athol, to him and the heirs male of his body. That the said Duke of Athol died in 1725, leaving James his eldest

Journ. v. 30. 466—469.

son, who succeeded to the title, and George his second son, who was the petitioner's father. That the said George was in the year 1745 attainted of high treason, by act of parliament, and died in 1760, leaving the petitioner his eldest son. That James, the second duke of Athol, died in 1764, without leaving any issue male. That the petitioner had consulted many gentlemen learned in the law of England, particularly the Honourable Charles Yorke, Sir Fletcher Norton, and Mr. De Grey, whether the said attainder, under the circumstances of the case, could be any bar to the petitioner's succeeding to the said title upon the death of his said uncle, James Duke of Athol; and the said gentlemen were unanimously of opinion, that as by the law of England in a like case, no objection could arise from the said attainder; and as by the statute of 7 Anne, all persons attainted of treason in Scotland were liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason in England, the petitioner would be clearly entitled to succeed to the said honors. The petitioner therefore prayed, that proper directions should be given for having the petitioner's right declared and established.

This petition was referred to the House of Lords, who resolved that the petitioner had a right to the title claimed by his petition.

Restitution
of Blood.

44. In all cases where a person has been attainted of high treason by Parliament, or by judgement on an indictment for high treason, petty treason, or felony, the corruption of blood can only be restored by Parliament.

P. C. c. 27.
3 Inst. c. 106.

Lord Hale says, restitutions by Parliament are of two kinds; one, a restitution in blood, which removes the corruption, but restores not to his heirs to the manors or honours

lost by the attainder, unless it specially extend to them; the other is a general restitution, not only in blood, but to the lands, &c. of the party attainted: that a restitution in blood may be special and qualified; but generally a restitution in blood is construed liberally and extensively.

45. In the case of the barony of Lumley, the petitioner's counsel produced an act of parliament made in 6 Edw. VI. upon the petition of John Lumley, eldest son and heir of George Lumley, son and heir apparent of John Lord Lumley, whereby, after a recital of the attainder of the said George Lumley, by reason whereof the said John Lumley stood, and was a person in his lineage and blood corrupted; and deprived of all degree, estate, name, fame, and of all other inheritance, that should or might by possibility have come to him by any other his collateral ancestors, on his said father's side, to whom he should or might have conveyed himself, as cousin and next heir of blood, by mesne degrees, by his said father. It was therefore enacted, that the said John Lumley and his heirs male of his body coming, might and should be accepted and called from thenceforth by the name of Lord Lumley; and that he and the heirs male of his body should have and enjoy, in and at all parliaments, and all other places, the room, name, place, and voice of a baron of the realm: and that the said John Lumley and his heirs, might be, and should be restored only in blood, as son and heir and heirs to the said George Lumley, and as cousin and heir and heirs of the said John Lord Lumley; and made only heir and heirs in blood, as well to the said George, as to the said John Lord Lumley, and either of them, by the name of Lord Lumley.

It was contended on behalf of the Earl of Scarborough, who opposed the claim, that the attainder of George Lumley was not reversed by this act, and that the restitution of the said John Lord Lumley in blood only, while the attainder remained unreversed, could not possibly revive the ancient barony, which was before extinct, and merged in the Crown by that attainder. That the construction of the act contended for would have this absurdity, that the same act must give the same barony to the same person, under two different limitations, one in tail male, the other in fee simple, and both in possession; and was not therefore to be admitted.

The House of Lords appears to have been of this opinion, and to have rejected the claim on that ground.

46. Where a person is outlawed for high treason, petty treason, or felony, his blood is also corrupted; but it may be restored by act of parliament, or by a reversal of the judgement of outlawry, by writ of error. But a writ of error to reverse an outlawry in treason or felony, is not *ex debito justitiæ*; and therefore can only be obtained by the favour of the Crown.

4 Burr. Rep.
2551.

Journ. v. 17.
119.

47. The House of Lords resolved in 1702, that they would not in future receive any bill for reversing outlawries, or restitution in blood, that should not be first signed by Her Majesty or her successors, kings or queens of the realm, and sent by her or them to their House first, to be considered there.

A Dignity
may be lost
by Poverty.

48. All titles of honour having been originally annexed to lands, it followed that no person could be a peer, without having an estate sufficient to support his dignity, which he could not alien without the consent of the Crown. A peer could, therefore,

never be arrested for debt ; the law presuming that he had sufficient lands and tenements in which he might be distrained. And there is one instance of a peer being degraded by parliament, on account of his poverty.

49. By an act of parliament made in 17 Edw. IV., reciting, that the King had erected and made George Nevill Duke of Bedford, and had purposed to have given him, for the sustentation of the same dignity, sufficient livelihood ; and for the great offences, unkindness, and misbehavings that John Nevill (his father) had done and committed to his Highness, as was openly known, he had no cause to depart any livelihood to the said George. And that it was openly known that the said George Nevill had not, nor by inheritance might have, any livelihood to support the name, estate, and dignity of Duke of Bedford : as oftentimes it was seen, that when any lord was called to high estate, and had not livelihood convenient to support the same dignity, it induced great poverty and indigence, and oftentimes caused great extortion, embracery, and maintenance to be had, to the great trouble of all such countries where such estate should happen to be inhabited. Wherefore the King, by the advice of the Lords spiritual, &c., ordained, that from thenceforth the said erection and making of the same duke, and all the names of dignity to the said George, or to John Nevill his father, should be from thenceforth void and of none effect.

6 Rep. 52 b.
7 — 34 a.

Rot. Parl.
v. 6. 173.
4 Inst. 355.
12 Rep. 107.

Idem, 107.

50. Sir W. Blackstone has observed, that Nevill's degradation is a singular instance ; which serves, at the same time, by having happened, to show the power of parliament ; and by having happened but once, to show how tender the parliament hath been in exercising so high a power.

1 Comm. 402.

Not within
the Statutes
of Limita-
tion.

51. As a dignity cannot be aliened, surrendered, or extinguished by the person possessed of it, neither can it be lost by the negligence of any person entitled thereto, in not claiming it within a particular time. From which it follows, that dignities are not within the statutes of limitation. This doctrine has been recognized by the House of Lords in a variety of cases, where claims to baronies, which had been dormant for centuries, have been received and admitted.

52. Even an adverse possession and exercise of a dignity by persons not entitled to it, for 85 years, will not bar the real owner.

Barony of
Willoughby
of Parham,
Printed
Cases.

53. Sir W. Willoughby, Knight, was, by letters patent, 1 Edw. VI., created Lord Willoughby of Parham, to him and the heirs male of his body. He was succeeded by Charles, his only son, who left five sons; William, Sir Ambrose, Edward, Charles, and Sir Thomas. The issue male of William, the eldest son, enjoyed the dignity till the year 1680, when they failed. Thomas Willoughby, the heir male of the fifth son, was then admitted to sit in parliament, as Lord Willoughby of Parham, upon the supposition that there was no issue male of any of the other sons; and he and his issue male enjoyed the dignity till the year 1765, when they became extinct. In 1767, Henry Willoughby, who was the heir male of Sir Ambrose, the second son of the second Lord Willoughby of Parham, claimed the dignity; and it was resolved by the House of Lords,—“That the petitioner had a right to the title, dignity, and peerage of Willoughby of Parham, which was enjoyed from the year 1680 to the year 1765, by the male line, then extinct, of Sir Thomas Willoughby, youngest son of Charles Lord Willoughby of Parham, who were suc-

cessively summoned to parliament by descent, in virtue of letters patent, 1 Edw. VI., and sat as heirs male of the body of Sir William, created Lord Willoughby of Parham by the said letters patent, contrary to right and the truth of the case; it then appearing that Sir Ambrose Willoughby, the second son of the said Charles, and the elder brother of the said Sir Thomas, who was averred to have died without issue, left a son, and that the claimant was great grandson and heir male of the body of such son, and consequently heir male of the body of the said Sir William, who was created Lord Willoughby of Parham; the male line of the eldest son of the said Charles Lord Willoughby of Parham having failed in or before the year 1680; and that the proof of the petitioner's pedigree being clear, the contrary possession ought to be no bar to his claim, as there was no person in being interested under such possession; without prejudice to the question, if there was."

The claimant took his seat accordingly.

Idem, 537.

TITLE XXVI.

DIGNITIES.

CHAP. III.

Of the Descent of Dignities.

- | | |
|---|--|
| 1. <i>Descent of Dignities by Tenure.</i>
4. <i>Descent of Dignities by Writ.</i>
8. <i>The Half Blood may inherit.</i>
12. <i>Abeyance of Dignities.</i>
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24. <i>Modes of terminating an Abeyance.</i>
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45. <i>Attainder of one of two Co-heirs does not determine the Abeyance.</i>
48. <i>Descent of Baronies created by Writs to the eldest Sons of Peers.</i>
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SECTION 1.

Descent of
Dignities by
Tenure.

DIGNITIES by tenure appear to have always been hereditary, and to have descended in the same manner as the castles or manors to which they were annexed. So that the descent of dignities of this kind, in the male line, was exactly similar to that of estates in fee simple, unless the castles or manors to which the dignity was annexed were entailed; for, in that case, the dignity descended to the person entitled to the castle or manor, under the entail, as appears from the cases that have been stated in a former chapter.

Tit. 29. c. 3.

c. 1. § 46.

2. In ancient times the right of primogeniture appears to have taken place in the descent of dignities by tenure, to females, as well as to males. For, Bracton, in treating of the partition of estates among coparceners, says, that where a mansion or castle was *caput comitatus* or *baroniæ*, it was not divisible, *propter jus gladii quod dividi non potest*; for by such a division earldoms and baronies would be destroyed. *Per quod deficiat regnum, quod ex comitatibus et baroniis dicitur esse constitutum.* Now, as the eldest sister had a right to the principal mansion *jure esneiciæ*, to which, if it was *caput comitatus*, or *baroniæ*, the service of attending parliament appears to have been always annexed, she would, in those times, have been entitled to the dignity. And this was exactly conformable to the feudal law, in which an indivisible feud descended to the eldest daughter.

76 a.

Brit. c. 72.

ante, c. 1.
§ 33.

3. The descent of earldoms and baronies in the reign of Edward I. appears, from the answers of the parliaments of England and Scotland, previous to the adjudication of the succession to the crown of Scotland, to have been to the eldest daughter. And Lord Coke has cited a charter of King Edw. III., in which the right of the eldest sister to the earldom of Pembroke is fully recognized.

Rym. Fœd.
vol. 2. 583.

4 Inst. c. 40.

4. With respect to dignities by writ, whatever doubts existed formerly respecting their being hereditary, it appears to have been fully settled in the time of Lord Coke, that they were descendible to all the lineal heirs of the person first summoned. The right of primogeniture takes place among males; and, in default of males, they are descendible to female heirs, and transmissible by such female heirs to their descendants.

Descent of
Dignities by
Writ.

5. This doctrine was admitted in the case of the barony of Grey of Ruthyn, in 1640; but was more fully considered, and solemnly established, in the following case.

Barony of
Clifton,
Collins, 291.

6. In 1673, Catherine Lady O'Brien claimed the barony of Clifton of Leighton Bromswold; and her petition having been referred to the House of Lords, the Committee of Privileges reported—"That Jervas Lord Clifton was summoned by writ to parliament, 6 Jac. I., by the title of Lord Clifton of Leighton Bromswold; so as the barony, being a fee simple, ought to descend from the said Lord Clifton upon his heirs; and that the Lady Catherine O'Brien being the heir, gradually and lineally descended from the said Lord Clifton, the barony did of right descend to her and her heirs."

It was ordered that the Judges should give their opinion in this case; which they did in the following words.

Journ. vol. 12.
629.

"The Lord Ch. Just. of the King's Bench, Lord Ch. Just. of the Common Pleas, Chief Baron Turner, Baron Littleton, Justice Atkins, Justice Ellis, and Baron Thurland, were unanimous in their opinions, that taking the case in fact to be as His Majesty's Attorney General reported it to be, and as it stood transmitted to that House, they found it to be thus, as to that lady's claim of the said barony. That Sir Jervas Clifton was summoned to parliament by the name of Jervas Clifton of Leighton Bromswold, by writ dated 9 Ja. I.; that accordingly he did come and sit in parliament as one of the peers of England; that he died 16 Ja. I., leaving issue behind him, Catherine, his sole daughter and heir, who married to the Lord Aubigny, afterwards Duke of Lenox;

that the said duke, 17 Ja. I., was, by letters patent, created Baron Leighton of Leighton Bromswold, in the county of Huntingdon, to him and the heirs male of his body, whereof none were then living; that the petitioner was lineally descended from him, and was his heir, (by the said report,) and as such then claimed the barony of Clifton. All which being admitted to be true, they were of opinion, first, that the said Jervas, by virtue of the said writ of summons, and his sitting in parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled; secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively, after several descents, to the petitioner, as lineal heir to the said Lord Clifton; thirdly, that therefore the petitioner was well entitled to the said dignity."

The House resolved, that the said Catherine Lady O'Brien had right to the barony of Clifton.*

7. The descent of dignities by writ is, in some respects, different from that of lands; for possession does not affect it, as every person claiming a dignity must make himself heir to the person first summoned, not, as in the case of lands, to the person last seised. Tit. 29. c. 3.

8. In consequence of this principle, a brother of the half blood shall inherit a dignity, in preference to a sister of the whole blood. Thus, Lord Coke says, "Of dignities, whereof no other possession can be had but such as descend (as to be a duke, marquis, earl, viscount, or baron,) to a man and his heirs, there can be no possession of the brother, to make his sister inherit; but the younger brother being heir The Half Blood may inherit.
1 Inst. 15 b.
3 Rep. 42 a.

* The doctrine established in this case has been admitted in a great number of modern cases, which will be stated hereafter.

(as Littleton saith) to the father, shall inherit the dignity inherent in the blood, as heir of him that was first created noble."

9. Lord Hale, in a note to this passage, published by Mr. Hargrave, observes, that if it was a feudal title of honour, as the earldom of Arundel, or barony of Berkeley, there, *possessio fratris* should hold well, because the title was annexed to land.

Cro. Car,
601.
Collins, 195.

10. A question was moved in parliament in 16 Cha. I. respecting the barony of Grey of Ruthyn, which was originally created by writ of summons. Lord Grey died, leaving a son and a daughter by one *venter*, and a second son by another *venter*. The barony descended to the eldest son, who sat in parliament, and afterwards died without issue. The question was, whether the second son should inherit the barony, or the sister; and the opinion of the Judges was required; who resolved, that there was not any *possessio fratris* of a dignity, but it should go to the younger son, who was *hæres natus*; and the sister was only *hæres facta*, by the possession of her brother, of such things as were in demesne, but not of dignities; whereof there could not be an acquisition of the possession.

Journ. vol. 4.
149.
8 Term R.
213.

Collins, 286.

11. In the case of the barony of Fitzwalter in 1668, the same objection was made before the Privy Council: and the question being put to the two Chief Justices, and Lord Ch. Baron Hale; they all agreed that the half blood was no impediment to the descent of a dignity.

Abeyance of
Dignities.

12. When dignities by writ were first introduced, they were probably descendible, in default of males, to the eldest female; in conformity to the rule then existing respecting the descent of baronies by tenure. But in course of time it became established, that

where a person possessed of a dignity by writ died, leaving only daughters or sisters ; as the dignity was of an impartible nature, it fell into a dormant state, and was said to be in suspence or abeyance.

13. Lord Coke has stated a case in 23 Hen. III. in these words : —“ Note, if the earldom of Chester descend to coparceners, it shall be divided between them, as well as other lands. And the eldest shall not have this seigniorie and earldom to herself, entire, *quod nota.* Adjudged, *per totam curiam.*” And he makes the following observations on this case.—“ By this it appeareth that the earldom (that is, the possessions of the earldom) shall be divided ; and that where there be more daughters than one, the eldest shall not have the dignity and power of the earl ; that is, to be a countess. What then shall become of the dignity ? The answer is, that in that case, the King, who is sovereign of honour and dignity, may, for the uncertainty, confer the dignity upon which of the daughters he please ; and this hath been the usage since the Conquest ; as is said.”

1 Inst. 165 a.
Fitz. Ab. Tit.
Partition, 18.

14. The above observations of Lord Coke do not seem to be well founded ; for it appears from Dugdale, that Ranulph Earl of Chester died in 16 Hen. III. without issue, leaving four sisters, of whom the eldest, Maud, was married to David Earl of Huntingdon, brother to William King of Scotland, by whom she had a son, surnamed Scotus, who succeeded Ranulph in the earldom of Chester ; but the reason was, that in the partition of the vast possessions of Ranulph, this John had for his part, his mother being dead, the whole county of Chester.

Bar. vol. 1.
44.
Collins, 99.

15. The decision cited by Lord Coke must have taken place on the death of the above-named John in 1237, according to M. Paris, leaving four sisters ;

but it cannot be relied on as an authority; for it appears from Knyghton, c. 35., that this was a special and arbitrary exertion of the prerogative, by which the King, probably from jealousy of the great powers and regalities of the Earls of Chester, continuing in the presumptive heir to the crown of Scotland, not only took the dignity of the earldom into his own hands, but also all the lands appertaining to it; making compensation to the four sisters of the last earl, in other lands.

Dugd. Bar.
Vol. 2. 245.

16. It appears to have been held, so late as in the reign of Henry VI., that the eldest daughter had a superior claim to that of her sisters, to the dignity of their ancestor. But whatever might have been the old law, the doctrine laid down by Lord Coke was fully established in his time; and it was soon after resolved by the Judges and the House of Lords, that where a dignity is descendible to heirs general, and the person possessed of it dies, leaving only daughters or sisters, or coheirs, it falls into abeyance, or rather becomes vested in the Crown, during the continuance of the coheirship.

Collins, 175.
Journ. vol. 3.
535.

17. Thus in the case of the earldom of Oxford, a report was made to the House of Lords by Lord Ch. Just. Crewe, that he, with the Lord Ch. Baron, Justices Doderidge, Yelverton, and Baron Trevor, had considered the titles of the competitors to the baronies of Bulbeck, Sandford, and Badlesmere; and they certified that the same baronies descended to the general heirs of John, the fourth Earl of Oxford, who had issue, John, the fifth Earl of Oxford, and three daughters, one of them married to the Lord Latimer, another to Wingfield, and another to Knightley; which John, the fifth Earl of Oxford, dying without issue, those baronies descended upon

the daughters, as his sisters and heirs; but these dignities being entire and not dividable, they became incapable of the same, otherwise than by gift from the Crown; and they in strictness of law reverted to and were in the disposition of King Henry VIII.

The House of Lords certified to the King, that for the baronies, they were wholly in his Majesty's hand, to dispose of at his pleasure.

18. The expression that baronies in abeyance are wholly in the disposal of the Crown, is too general; for it is not in the power of the King to dispose of such baronies to a stranger. The Crown has only the prerogative of terminating the abeyance or suspension of a dignity, by nominating any one of the coheirs to it: and such nomination operates, not as a new creation of a barony, but as a revival of the ancient one. For the nominee becomes entitled to the place and precedence of the ancient barony to which he is nominated.

The Crown may terminate the Abeyance.

19. This prerogative does not however appear to have been of ancient date, for though Lord Coke, in the passage above cited, respecting the earldom of Chester, carries it up to the Conquest, *as was said*: yet in his Reports he says, Camden told him, *some* held, that if a baron died having issue divers daughters, the King might confer the dignity on him who married any of them; as had been done in divers cases: viz. in the case of Lord Cromwell, who had issue divers daughters, and King Henry VI. conferred the dignity upon Bourchier, who married the youngest daughter; and he was called Lord Cromwell. The Crown has, however, exercised this prerogative in so many subsequent instances, that it cannot now be questioned.

12 Rep. 112.

20. Robert Devereux, Earl of Essex, Viscount Hereford, and Lord Ferrers of Chartley, a barony descendible to heirs general, died without issue in 1646, leaving his two sisters his coheirs. In 1678 Sir Robert Shirley, grandson of Lady Frances, one of the sisters and coheirs of the said Earl of Essex, was summoned to parliament, by writ, directed to Robert Shirley de Ferrers, Chevalier. It was opened to the House by the Lord Chancellor, how his Lordship came in upon descent, so no introduction to be: and he was placed upon the barons bench, next below Lord Berkeley.

Journ.
Vol. 13. 130.

18 March,
Journ.

21. In 1720 a writ of summons was issued to Hugh Fortescue, by the title of Hugh Fortescue de Clinton, Chevalier. When he took his seat, the Lord Chancellor explained to the House his descent; how he was one of the heirs of Theophilus late Earl of Lincoln, and Baron Clinton, which barony was then in abeyance between Mr. Fortescue and Samuel Rolle, Esq.

Journ.
vol. 30. 403.

22. In 1763 a writ of summons was issued to Sir Francis Dashwood, Baronet, by the title of Lord Le Despencer; the Lord Chancellor informing the House of Lords that he was one of the heirs of Lady Mary Fane, in favour of whom and whose heirs King James I. had revived the ancient barony of Le Despencer. Thereupon he was allowed to take his seat upon the upper part of the bench, next above Lord Abergavenny.

23. The barony of Willoughby de Eresby fell into abeyance in the year 1779, by the death of Robert Bertie, Duke of Ancaster, without issue, leaving Lady Priscilla Barbara Elizabeth, and Lady Georgiana Charlotte, his sisters and coheirs. In the following

year His Majesty confirmed that barony to Lady Priscilla Barbara Elizabeth, then the wife of Peter Burrell, Esq. since created Lord Gwydir.

24. When the King terminates the abeyance of a barony in favour of a commoner, he directs a writ of summons to be issued to him, by the style and title of the barony which is in abeyance ; as in the cases of Lord Ferrers and Lord Le Despencer. Where the person in whose favour an abeyance is determined is already a peer, and has a higher dignity, there the King confirms the barony to him by letters patent : and in the case of a female, the abeyance is also terminated by letters patent.

Modes of terminating an Abeyance.

25. Formerly it was the practice to confirm the barony to the coheir and his or her heirs ; but now it is more properly to the heirs of his or her body : for no one can be heir of the body of the person in whose favour the abeyance is terminated, without being also lineally descended from the person first summoned.

26. Where the abeyance of a barony is terminated by a writ of summons, different opinions have been entertained respecting the extent of the operation of such a writ. Some eminent persons are said to have held, that where a barony is in abeyance between the descendants of two coheirs, and the King issues his writ of summons to one of the heirs of the body of one of the two coheirs, the abeyance is thereby terminated, not only as to the person summoned, and the heirs of his or her body, but also as to all the heirs of the body of such original coheir. But the better opinion seems to be, that the effect of a writ of summons, in a case of this kind, is only to terminate the abeyance, as to the person summoned, and

Effect of a Writ to one of the Heirs of a Coheir.

the heirs of his or her body ; and that upon failure of heirs of the body of the person so summoned, the barony will again fall into abeyance, between the remaining heir or heirs of the body of the original coheir, one of whose heirs was so summoned, if any, and the heir or heirs of the body of the other coheir.

27. This latter opinion is founded upon a principle of law, that possession does not affect the descent of a dignity ; and that a writ of summons to parliament by an ancient title (as the summons of the eldest son of a peer, in the lifetime of his father, by the name of an ancient barony then vested in the father,) will not operate, so as to give any title by descent, collateral or lineal, different from the course of descent of the ancient barony ; and that he who claims a dignity must make himself heir to the person on whom the dignity was originally conferred ; not to the person who last enjoyed it.

Vide Barony
of Sydney,
infra.

Cases of
Claims to a
Cohairship.

28. In consequence of the practice of terminating an abeyance, several claims have lately been made to a coheirship in a barony : but the King has seldom terminated the abeyance in favour of one of the coheirs, without first referring the case to the House of Lords, in order to satisfy himself of the existence of the barony, and who the persons were, between whom it was in abeyance.

Barony of
Botetourt,
Printed Case.

29. In the year 1764, Norborne Berkeley petitioned the King to be nominated to the ancient barony of Botetourt, created by writ in 33 Edw. I. directed to John Botetourt. This petition having been referred to the House of Lords, it was there resolved that the barony of Botetourt was in abeyance ; and that the petitioner was one of the coheirs of John Lord Botetourt.

Journ.
vol. 30. 561.

A writ of summons was soon after directed to Mr. Berkeley, by the name of Norborne de Botetourt, Chevalier, who took his seat accordingly.

30. In 1784, Sir John Griffin Griffin petitioned His Majesty to be nominated to the barony of Howard of Walden, created by writ of summons in 39 Eliz. directed to Lord Thomas Howard, second son of the Duke of Norfolk, the petitioner being one of the coheirs of the said Lord Thomas Howard.

Barony of
Howard of
Walden,
Printed Case.

The House of Lords resolved that the barony of Howard of Walden was in abeyance, and that the petitioner was one of the coheirs of James the then last Lord Howard of Walden. Soon after which Sir John Griffin Griffin was summoned to parliament by writ, as Lord Howard of Walden.

31. Lady Henry Fitzgerald petitioned His Majesty in 1805 to be nominated to the barony of Roos, as one of the coheirs of Robert de Ros or Roos, who was summoned to parliament in 49 Hen. III. The House of Lords resolved that Sir Thomas Windsor Hunloke, George Earl of Essex, and the petitioner, were the coheirs of Robert de Ros; and that the barony which was vested in the said Robert de Ros remained in abeyance between the said Sir T. W. Hunloke, George Earl of Essex, and Lady Henry Fitzgerald: soon after which His Majesty confirmed the barony to Lady Henry Fitzgerald.

Barony of
Roos,
Printed Case.

32. In 1807, Sir Cecil Bishop petitioned the King to be nominated to the barony of Zouch of Harringworth, it being a barony by writ, as appeared from several writs of summons of a date anterior to the 11 Rich. II., in which year it was well known that the first instance of creating a baron by patent took place. The House of Lords resolved that the barony of Zouch of Harringworth was a barony created by

Barony of
Zouch,
Printed Case.

24th April
1807.

writ in the reign of King Edw. II. and therefore descendible to heirs general: and that the said barony fell into abeyance, upon the death of Edward the last Lord Zouch, between Zouch Tate his grandson, being the son and heir of Elizabeth his eldest daughter, and Mary, wife of William Connard, Esq., his youngest daughter, which said Elizabeth and Mary were the only daughters of the said Lord: that the petitioner and certain other persons were the coheirs of the said last Lord Zouch, together with the heir or heirs of the body of the said Mary, the youngest daughter of the said last Lord Zouch; if the said Mary had any heir or heirs of her body then in existence; and if she had left none, such were the sole coheirs of the said last Lord Zouch: that the said barony was in abeyance among the said coheirs, and consequently was at His Majesty's disposal*.

Where only
one Heir the
Abeyance
terminates.

ante, § 17.

33. In all cases of abeyance of dignities, whenever the coheirship determines by the death of all the daughters or sisters but one; or by the extinction of all the descendants of such daughters or sisters but one, by which there remains only one heir to the dignity, the abeyance is terminated, and the person who is the sole heir becomes entitled to the dignity. For although it was held by some, that in the case of the earldom of Oxford, the Judges had given their opinions that by the descent of a barony upon coheirs, it became so completely vested in the Crown, that no person could afterwards acquire a right to it, without a grant from the Crown; yet it was soon after settled, that where the coheirship ceased, and there remained only one heir, such sole heir became

* Sir Cecil Bishop has been summoned to this barony.

entitled to it, as a matter of right, and not of favour, from the Crown.

34. Sir Robert Ogle was summoned to parliament 4 Edw. IV., and the title descended to Cuthbert Ogle, who was summoned to parliament 5 Eliz. and died in 39 Eliz., leaving two daughters his heirs; Joan married to Edward Talbot, a younger brother to the Earl of Shrewsbury, who died without issue; and Catherine married to Sir Charles Cavendish of Welbeck. Catherine having survived her sister, and being sole heir to the barony of Ogle, obtained special letters patent, 4 Car. I., declaring her to be Baroness Ogle of Ogle, in the county of Northumberland, to her and her heirs for ever; a copy of which is given by Collins.

Barony of
Ogle,
Dugd. Bar.
vol. 2. 363.

p. 412.

35. In this case the confirmation might have been a matter of favour: and, indeed, an opinion seems to have prevailed during the reign of King Charles II., that where a dignity fell into abeyance, it was in the power of the Crown to extinguish it. This appears from the letters patent by which the barony of Lucas of Crudwell was granted to the Countess of Kent; in which there is a proviso, "That if there shall be more persons than one, who shall be coheirs of her body by the said Earl of Kent, whereby the King's Majesty, his heirs or successors, might declare which of them he pleases to have and enjoy the said honour, title, and dignity, or might hold the same in suspence, *or extinguish the same*, at his and their pleasures; that nevertheless the said honour, title, and dignity shall not be held in suspence, or extinguished, but shall go to and be held and enjoyed, &c."

36. But the doctrine, that where a dignity fell into abeyance, it might be extinguished by the Crown,

Barony of
Clifford,
Collins, 306.
S. P.

appears to have been fully disproved in the following case ; in which it was determined by the House of Lords, after great deliberation, and assented to by the Crown, that where a dignity falls into abeyance between coheirs, whenever there is a determination of the coheirship, by the death of all the coheirs except one, such one heir becomes entitled to the dignity, as a matter of right.

Barony of
Willoughby
de Broke,
Coll. 322.
Skin. Rep.

37. In 1694, Sir Richard Verney, Knight, claimed the barony of Broke, as lineal heir to Sir Robert Willoughby, who was summoned to parliament 7 Hen. VII., the writ being directed, *Roberto Willoughby de Broke, Chevalier* ; to whom succeeded Sir Robert Willoughby, who was summoned to parliament by the same title, and sat accordingly temp. Hen. VIII. : from him the barony descended to Lady Elizabeth Greville (she having survived her two sisters, who died without issue), from whom it descended to her grandchild and heir, Sir Foulk Greville, Knight, (who was created Lord Broke, to him and his heirs male) ; but who dying without issue, the barony descended to Margaret Lady Verney, the petitioner's grandmother.

The Attorney General argued against this claim, 1st, That a summons by writ did not create an estate in fee ; for that anciently several had been so summoned, and yet their sons had never been summoned after them : nay, sometimes the very person first summoned had afterwards been omitted to be summoned. But he did not design to urge that any farther, but chiefly insisted, that even in the time of King Henry VII., when Sir Robert Willoughby was first summoned, it was not considered as an estate in fee ; urging Latimer's case, and, of later times, Aber-

gavenny's case, and Paget's. 2d, That, if it did descend, it was extinguished in the coheirs of Lady Margaret Greville; urging the Earl of Oxford's case.

The counsel for the petitioner replied, that, as to the baronies of Latimer and Abergavenny, those honours followed the entail of the lands, as baronies by tenure. As to the resolutions in the Earl of Oxford's case, touching the baronies of Bulbeck, Sandford, and Badlesmere, that they were in His Majesty's disposition; they allowed that the King might dispose of them to which of the coheirs he pleased, during the coparcenership, but not to a stranger, nor to the heir male collateral, who had no right thereto, so long as there were heirs general.

The House of Lords resolved, that the petitioner had no right to a summons to parliament.

A committee was appointed to draw up a report to the King pursuant to the said resolution, since the chief reason for rejecting the said claim seemed to be, that the said barony was for some time lodged in coheirs; and that therefore it was in His Majesty's power to hold the same in suspense or abeyance, or to extinguish the same.

38. The committee was adjourned before any report was made. But in the interim several peers, as the Earls of Lindsey, Thanet, Sussex, and Abingdon, the Lord Delawarre, &c., who had baronies by writ in them, (some whereof had at that time only daughters,) looking upon themselves concerned from what was mentioned at the Committee in relation to the descent of such baronies on coheirs; moved the House that a day might be appointed to consider of what had been mentioned by some Lords on that day in relation to the descent of baronies by writ: and a day

Journ. v. 15.
442. 458.
552.

was appointed accordingly. In pursuance whereof, the Lords who interested themselves therein were heard by their counsel, Mr. Finch and Sir Thomas Powis; and it was then ordered, that the King's Attorney General should be likewise heard touching the said matter.

The Attorney General argued for the King against the descent of baronies by writ, and the counsel for the Lords replied, and produced precedents, which being collected by Mr. King, Lancaster Herald, were printed on that occasion.

This printed paper is entitled, “Baronies by writ devolving upon coheirs, enjoyed by, or conferred upon, the person or issue of the surviving coheir, where such person or issue become sole heir to the barony.”—It contains the cases of Lord St. John of Basing, Lord St. Amand, Lord Roos, Lord Bardolph, Lord Coniers, Vipount Lord of Westmerland, Lord Ogle, and Lord Clifford; and concludes with the following observations: “If a barony in fee once suspended, or put in abeyance, by falling upon coheirs, cannot be taken up again without some instrument from the King to revive it, then if a baron in fee should die leaving two daughters, and a brother, though one of the daughters should die ever so soon after the death of her father, yet the other daughter could not have the title, but at the King's pleasure. And if both the daughters should die without issue, their father's brother will not be a peer, but at the pleasure of the King: nay, if such a baron should die leaving two daughters and his widow with child of a son, upon the death of such baron, the title will be suspended till the son is born; and according to this rule the son will not be a baron, but at the King's pleasure, because the title was once suspended.

“ The suspension in case of coheirs doth not arise from any incapacity either in the blood, or in the persons, of the coheirs ; but only because both cannot take the barony at once ; and neither of them in law is preferred before the other : therefore of necessity the title in such a case remains in abeyance or suspension, until it be either fixed in one by the King, whilst there are several coheirs in being, or else until it is fixed in one by the law, upon her or her issue’s becoming the survivor ; for when the only reason for suspension is removed, the survivor hath the same right as if she at first had been the sole heir. The contrary opinion to this doth tend to the extinguishment of titles of honour, in such cases as may and will frequently happen ; and according to this it may often be in the King’s pleasure to exclude the male descendants of barons in fee from sitting in parliament, if in the elder brother’s line the title of honour should be ever suspended for the shortest time, by more than one daughter.”

The House ordered that the Heralds should be heard as to the said precedents, who were accordingly heard at the bar, in relation to the descent of baronies by writ. And Sir Thomas St. George, Garter, made several objections to the said printed precedents ; upon which Mr. King was called to prove the same, who justified them by the books and records of the Heralds’ Office. An authentic copy of the King’s recognition of the barony of Ogle in 4 Cha. I. being read at the bar ; and the matter being reported by the Lord Keeper ; the question was put, “ Whether if
Journ. v. 15.
522.
a person summoned to parliament by writ, and sitting, die, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right

to demand a summons to parliament ;"—and it was resolved in the affirmative.

39. The principal objection, touching the extinguishment of the barony of Broke, by reason of its descending to coheirs, being removed, Sir Richard Verney claimed the barony of Willoughby de Broke, as the sole heir of Sir Robert Willoughby de Broke.

Journ. v. 15.
634. 643.
671.

Sir Thomas Powis, as his counsel, read a list of those peers who had baronies by writ in them, included under higher titles ; and also a list of those Lords who then sat in the House by virtue only of original writs of summons, and by descent from baronies in fee ; and a list of several noble ladies, who had then such baronies in them, some of whom had been declared baronesses in parliament : and insinuated to the Lords, that while he was arguing one peer into the House, the King's counsel were arguing several noble dukes and earls out of their baronies, and several sitting barons out of the House. For, if a summons by writ was not an estate in fee, and descendible, then might the King choose whether he would summon those barons any more to parliament, after the conclusion of the present parliament ; and so by that means would subject the peerage to great uncertainties, and destroy all their resolutions and judgements touching the descent of such baronies.

ante, c. 1.
§ 66.

The King's counsel urged several instances of ancient times against the descent of such baronies, and argued against the operation of the writ ; and that in this case it did not appear but that the first foundation of the honour might have been by patent, or for life, or in tail male ; and vouched Bromflete's case. He farther insisted, that the descent of the barony to coheirs did merge or extinguish it ; or make

it revert to the Crown; and that it was in abeyance, by which means it was left to the clutches of the law, so as not to be taken out from thence, by any person whatsoever, otherwise than by a new creation.

The petitioner's counsel replied, that the honour could not be by patent, nor by writ, with a limitation to the heirs male: for that there was issue male from each of the two Sir Robert Willoughbys, who yet were not barons; insisting upon the right of the peerage in general, and that, upon the true construction, the title was Willoughby of Broke.

After long debate, it was resolved that Sir Richard Verney had a right to a writ of summons to parliament, by the title of Lord Willoughby of Broke.

A writ of summons was accordingly issued to him; and he was seated in the House of Peers by descent, without ceremony, in the ancient place of his ancestor Sir Robert Willoughby, next above Lord Eure.

Journ.vol.15.
668.

40. Since this determination, several claims have been made to baronies which had been in abeyance, upon the ground that the abeyance was determined; and that the claimant was, by the failure of heirs of the other coheirs, become the sole heir to the barony.

Cases of
Claims by
a surviving
Heir.

41. Catherine Bokenham claimed, in 1717, the barony of Berners, which had fallen into abeyance, as sole heir of Sir John Bouchier, Lord Berners, the abeyance being then terminated.

Barony of
Berners,
Journ.vol.21.
266. 339.
Collins, 331.

The petition was referred by His Majesty to the House of Lords. Lord Clarendon reported from the Committee of Privileges, that search had been made so far back as the reign of Edw. III., whether any patent had been granted for creating Sir John Bouchier a baron, but none could be found: that there was produced a writ of summons to parliament in

33 Hen. VI., directed *Johanni Bourchier de Berners*, along with several other writs directed to him; and also several writs directed to his grandson and heir.

That the Committee had inspected the Journals of the House in the reign of Henry VIII. and found the name of Lord Berners entered therein, as present several days.

That it appeared to the Committee that the petitioner was (by the death of her brothers and sisters without issue) become sole heir of Sir John Bourchier Knight, first Lord Berners, and was lineally descended from him.

The House resolved that the said Catherine Bokenham had a right to the said barony of Berners.

Barony of
Clinton,
Printed Case.

42. In 1794, Mr. Trefusis claimed the barony of Clinton, as sole heir to Edward Lord Clinton, who was seised of the said barony in 4 & 5 Phil. & Mary, which had fallen into abeyance in 1692, between Lady Catherine Booth, Lady Arabella Rolle, and Lady Margaret Boscawen: that in 1717 the line of Lady Catherine Booth failed: that in 1720 the King had terminated the abeyance between the heirs of Lady Arabella Rolle and Lady Margaret Boscawen, by granting a writ of summons to Mr. Fortescue, the heir of Lady Margaret Boscawen; and that by the extinction of the line of Lady Margaret Boscawen, the abeyance determined, and Mr. Trefusis, who was the sole heir of Lady Arabella Rolle, became entitled to the barony.

ante, § 21.

20th February
1794.

The House resolved that the petitioner had made out his claim to the title, honour, and dignity of Baron Clinton; and a writ of summons was issued to him accordingly.

Barony of
Conyers,
Printed Case.

43. In 1798, the Marquis of Carmarthen claimed the barony of Conyers, created by writ of summons

to William Conyers in 1 Hen.VIII. which had fallen into abeyance in 1557, by the death of John Lord Conyers, leaving three daughters and no issue male; but the abeyance terminated in 1664, by the extinction of the line of two of the daughters, and Conyers D'Arcy, the heir of the third daughter, took his seat in the House of Lords as Lord Conyers, to whom the petitioner was sole heir.

The House of Lords resolved that the petitioner had made out his claim to the title, honour, and dignity of Baron Conyers.

44. Sir John Griffin Griffin, in whose favour the abeyance of the barony of Howard of Walden was terminated in 1784, having died without issue; and there being a complete failure of heirs of the coheir under whom he derived; the barony was claimed in 1807 by C. A. Ellis, an infant, as the sole heir of the other coheir, being the heir of the last Earl of Bristol. The Committee of Privileges resolved that the petitioner had made out his claim.

Barony of
Howard of
Walden.
Printed Case,
1807.
ante § 30.

45. It has been held by the House of Lords, in a recent case, that where a barony was in abeyance between two persons, the attainder of one of them for high treason did not terminate the abeyance, and give to the other a right to the barony.

Attainder of
one of two
Coheirs does
not determine
the Abeyance.

46. Thomas Stapleton of Carleton, in the county of York, esq., claimed the barony of Beaumont; and stated, that Henry de Beaumont was summoned to parliament in the second, third, fourth, and several other years of the reign of Edward II., and sat in parliament. That the barony of Beaumont descended to William Lord Beaumont, who died 24 Hen. VII. without children, leaving an only sister Joan. That the said Joan married John Lord Lovell, and had issue a son, who died without issue, and two daugh-

Barony of
Beaumont.
Printed Case.

ters: Joan, who married Sir Bryan Stapleton, to whom the claimant was heir at law; and Frideswide, who married Sir Edward Norris. That Frideswide had two sons, Sir John Norris, who died without issue; and Henry Norris, who was attainted of high treason in 27 Hen. VIII., and from whom the Earl of Abingdon was lineally descended, and was his heir. That, upon the death of Sir John Norris without issue, the abeyance in the barony of Beaumont ceased; and the whole right and claim to the same vested in the heirs of Joan the eldest sister. That the petitioner was the heir general of Henry de Beaumont, who was first summoned to parliament; and therefore apprehended, and was advised, that he had a legal claim to the said barony.

This petition was referred to the Attorney General (Sir John Scott), who reported—"That an important question arose, whether by the attainder of Henry Norris, the abeyance was determined, and the heirs of the eldest sister exclusively entitled by descent to the barony of Beaumont, by reason of the incapacity of Henry Norris's heirs thereby created, to claim through him? Upon this point he humbly certified to His Majesty, that he had not been able to find any satisfactory determination; and, inasmuch as this point materially affected His Majesty's royal prerogative, and the principles of law, with respect to the descent of honours and dignities, he humbly presumed to submit to His Majesty, that, before any act was done pursuant to the prayer of the petition, it might be fitting to refer the whole matter of the petition to the House of Peers."

The petition having been referred accordingly, it was contended by Mr. Stapleton's counsel, that the coheirship was determined by the attainder;

and that the case of Charleton Lord Powis was in point.

In that case, Lord Powis died seised of the barony Collins, 398. of Powis, which was created by writ, leaving two daughters; Joan married to Sir John Grey, and Joyce married to Lord Tiptoft. Joyce left issue a son, John Lord Tiptoft, who was created Earl of Worcester, and was attainted of high treason, and executed, 10 Ed. IV. Joan had issue a son Henry, who left issue a son Richard, who left issue a son John. Neither Henry nor Richard were ever summoned to parliament; but John, who was ten years old when the Earl of Worcester was attainted, was summoned to parliament 22 Ed. IV., by the title of John de Grey de Powis. And, in this case, it could not be said that John de Grey had the barony by favour of the Crown; because he was summoned to the first parliament which was holden after the attainder of the Earl of Worcester, and his attaining his age of 21 years; when it could not be supposed he had done any service to his King and country, to merit such a favour.

The Lords referred a question of law to the Judges, viz. "Whether, supposing the claimant to have proved himself one of the coheirs of the body of Henry de Beaumont; and, supposing a barony to have been created in the said Henry and the heirs of his body, the claimant was then entitled of right to such barony, according to the state of the pedigree last delivered in on his part?"

On the 25th day of June 1795, the Lord Chief Justice of the Common Pleas (Eyre) delivered the following opinion of the Judges on this point, after

stating the question in the precise form in which it appears above.*

“My Lords, the Attorney General, on the part of the Crown, summed up his objections to the claim in a very few words. He said, he opposed the claim on this single point, that the claimant Mr. Stapleton was not the heir of Henry de Beaumont; that it was not enough that he might be a part, a moiety for instance, of the heir; that he must have the complete character in him. Your Lordships question supposes Mr. Stapleton to have sufficiently made out his pedigree, and that he is to be taken to be one of the coheirs.

“Coheirs derive to themselves title to the inheritance of their ancestor by descent; they are heir to the ancestor. Our books, in particular Sir Edward Coke’s comment on Littleton, section of coparceners, points out the manner in which they claim. They are altogether *unus hæres, unum corpus*: their heirship is *unitas juris*: the whole body of the coheirs, however numerous, must unite to constitute the heir.

“To illustrate this doctrine, Sir Edward Coke puts the case of the inheritance of coheirs, sued for in our courts; he says, they must all join in a *præcipe*, for they all make but one heir. He puts another case of coheirs, claiming to take under a limitation to the right heirs of A.; and he states the law to be, that one of the coheirs standing alone cannot take any thing; for he is not the right heir of A. The case, as he puts it, is a particular one; and, in its circum-

* From a manuscript in his own handwriting, for the use of which I am indebted to the kindness of Sir Thomas Plumer. M. R.

stances, approaches towards the case now under consideration. But I choose to disentangle it, in this part of the argument, of those circumstances, and state it simply as an authority, that one coheir does not come within the description of heir, and cannot claim as heir.

“Coheirs hold in coparcenary: they are called coparceners, because they participate in one inheritance, derived to them by one title. Though they participate, our books say, no man doth know his part in severalty: they therefore occupy that which is capable of occupation, in common. But though no one knows his part in severalty, yet each man’s quantity of interest in the whole inheritance is well known: for instance, if he is one of two coheirs, he is entitled to a moiety; if one of three, to a third, and so on; and if the subject of the inheritance is in its nature partible, lands for instance, he may sue his writ of partition, and make division of the subject into moieties, thirds, &c. as the case shall be. And, when that is done, instead of participating in one inheritance, each coparcener takes the part allotted to him in severalty. He then loses his character of coparcener, and becomes sole owner of the part allotted to him; but it must be remembered, that the effect and operation of this partition pursues the nature of his original right in the whole inheritance; he has still but a part of it, though he holds it in a different manner. This operation of partition is, of necessity, confined to inheritances, the subject of which is in its nature partible; it applies not to inheritances in their nature impartible. Coheirs must therefore continue to hold such inheritances for ever, in the same manner as they held partible inheritances before partition; with this difference only, that the law has

provided certain means, adapted to the nature of some impartible inheritances, for enabling coheirs to hold them in coparcenary, with benefit and advantage to the whole body of the coheirs ; and with due regard to the quantity of interest each of the coheirs may claim in the inheritance.

“Thus the coheirs of an advowson present by turns; and the castle goes to the elder coheir, she making compensation to the others; and other instances might be mentioned.

“A peerage is a most transcendant honour and dignity; but it is still in the eye of the law an inheritance, and it will descend to coheirs in the same manner as other hereditaments do descend. The title of the coheirs of a barony is that of *unus hæres, unum corpus*; it is *unitas juris*: they must take it, and it must vest in them, as the heir of the ancestor. This inheritance stands at the head of the class of inheritances, in their nature impartible. But it is an inheritance of such a nature, producing fruits of dignity and of public duty, individual and incommunicable by any of the common means which the law has provided for the enjoyment of impartible inheritances ; that when it happens to vest in coheirs, it necessarily falls into a dormant state. No single coheir can assert a claim to it, for such a claim would be contrary to his interest: he does but participate in the inheritance; he can therefore sustain no claim to the whole of it: and this inheritance is so singularly circumstanced, that even the whole body of the coheirs can assert no claim to it, because they are incapable of possessing, or in any manner enjoying it.

“When this inheritance is in this dormant state, it is said to be in abeyance ; not in abeyance in the ordinary sense of the term, as was observed by Mr. At-

torney General, in which it is applied to an estate in fee simple or freehold in suspense, floating, fixing no where, and vesting in no one ; but it simply denotes, that the title to a barony, which has descended upon, and is vested in coheirs, remains in them in an inactive and dormant state, incapable of being asserted or being enjoyed. That none of the ordinary means provided by law for making impartible inheritances productive to coheirs, could be applied to this inheritance. One remedy, and one only, has been provided by law for the case of a dormant peerage ; it is, *sui juris*, of a most extraordinary nature, but very suitable to the dignity of the subject to which it is applied : I mean the prerogative right of calling one of the coparceners, by writ of summons, to sit in the seat of his ancestor. He will, from thenceforth, be in the exclusive possession and enjoyment of the inheritance, and will hold it to him and the heirs of his body ; yet still he is but one of the coheirs of his ancestor, and the rest of the coheirs still remain coheirs : and, in the event of the failure of heirs of the body of that coheir, whom the prerogative hath thus preferred, the other coheir (if but one) would take the whole inheritance ; or, if there were more than one, the barony would again fall into abeyance. I have stated what I take to be the true nature of this abeyance of a barony : it falls into abeyance, because, in point of right, no one coheir can sustain a claim to it ; and because all the coheirs together, though they constitute the complete heir to the ancestor, cannot claim it with effect, and therefore cannot claim it at all. The effect of the prerogative right of calling one of the coheirs to sit in the seat of his ancestor, is not to change the nature of his original title to participate in the inheritance ; nor does it in any manner enlarge

the quantity of his interest in the inheritance, as it stood originally; it takes nothing from the title of the other coheirs; it does not attract their portion of the heirship, and unite it with that of the coheir preferred; but it creates a title to sit in the seat of the ancestor, in a great degree collateral to the title by inheritance. The prerogative is only restricted to issue the writ of summons to one of the persons who has part or share in that title: the interposition of the prerogative is, as I have before observed, *sui juris*, entrusted to the Crown, in order to qualify the necessary consequences of the law of descent to coheirs, as applied to the inheritance of a barony; and, I apprehend, it proceeds upon the ground of the law being as I have stated it to be. It was with great ability, and very ingeniously turned by the counsel for the claimant, and used to qualify the law of descents itself, instead of the effects of the law. It was not denied that in general many coheirs make but one heir; but it was said, that this would be an inconvenient and an absurd doctrine, as applied to a barony: that the coheirs of a barony were all of the blood of the ancestor, and must all be capable of the honour, and sitting in the seat of the ancestor; inasmuch as the King, by his prerogative, could prefer any one of the coheirs, and place him in the seat of the ancestor: that there were therefore, in the coheirs of a barony, a plurality of persons, all capable of succeeding to the dignity; and that they were therefore, in effect, a plurality of heirs. Upon this they proceeded to erect their fabric.

“A barony, say they, falls into abeyance only because there is a plurality of heirs capable of taking the peerage; and the law knows not how to select one from amongst them. But this is the office of the

pater patriæ, entrusted to the Crown so long as the necessity exists ; and the necessity exists so long as the plurality exists. That as the law abhors abeyance, the moment the plurality of persons capable of sustaining the dignity is by any means removed, and only one of the coheirs thus capable of sustaining the dignity is left, the barony is no longer in abeyance ; the Crown no longer finds any thing upon which the prerogative can act : and, if the barony is neither in abeyance nor extinct, it must vest in the single coheir, who is thus left without a competitor. If they had built upon solid foundations, it might have been necessary to have gone farther into this case, in order to see whether the plurality they speak of has been removed ; and to have examined with care the actual situation of the other branch of this noble family, the Norris branch ; to have considered it as it stood on the death of Sir John Norris without issue, which is the moment when the sole right of this barony is supposed to have vested in the ancestor of the claimant ; the situation of the Norris branch, after the act of parliament had passed for restoring the issue of Henry Norris in blood ; and the possible situation of the Norris branch, supposing the issue of Henry (who was attainted) hereafter to fail, and the issue of his sisters to continue. Out of this examination, many questions of grave and weighty consideration would arise ; and they would require more time for a satisfactory discussion of them than at this period of the sessions of parliament could probably have been spared.

“Your Lordships might possibly entertain a doubt with regard to these questions, as well as to another question ; namely, whether the title to a barony can survive, when it is become impossible that all the

component parts of it can vest in one person. Your Lordships may entertain a doubt, whether, as to questions of this nature, there are the proper parties before you, whom these questions do, in point of inheritance, concern.

“ But, my Lords, upon the best consideration we could give to the case now in judgment, we humbly offer it to your Lordships as our clear opinion, that the argument in support of the plaintiff’s title is fallacious; and he being but a coheir, his claim to be solely entitled to this barony, as it has been made for him, is unfounded.

“ My Lords, the nature of the prerogative right infers no capacity in the coheir. The prerogative is, on the contrary, a provision for the incapacity of the coheir. There is no plurality of persons capable : the plurality is of persons incapable, either standing alone or even uniting. The abeyance is not produced, by the law not knowing how to select from among capable persons : the abeyance is, because there is no one capable, and also, because all are incapable. Abeyance cannot determine by the removal of a plurality of persons capable, because such a plurality never existed : abeyance determines by uniting all the detached parts of the title in one, and by that means restoring to the title activity and capacity to be possessed and enjoyed. And unless the claimant could make out, that the effect of the actual situation of the other coheir at the period he has chosen to fix upon, namely, the death of Sir John Norris without issue, was such, that all the component parts of the title of heirship did unite in this claimant, he can never take this barony out of abeyance by his own strength, or sustain a claim to be solely entitled to it. This is the ground upon which

the Attorney General stood, and we apprehend he has sustained it.

“ In this case we have not derived much assistance from authorities or precedents. The case of the barony of Powis was mentioned, and seemed to approach this. We must call that case to the consideration of your Lordships from your Journals, not being informed of the particular grounds of law on which it proceeded. I will mention one case from Coke upon Littleton. Supposing this barony not to be extinct (concerning which we are not called upon to deliver any opinion), and the present claimant be a coheir, let the situation of the other coheir be whatever the counsel for the claimant would wish it to be (except that there is no failure of issue *naturaliter*), the effect of which might be, that the title of that coheir would run upwards to the common ancestor, and from thence fall down in the course of the descent of the Stapleton line, and unite with their title in the person of the claimant; I conceive that one of the cases mentioned by Sir Edward Coke, and upon which the claimants counsel relied for another purpose, proves, that the claimant cannot make title to the whole inheritance. Sir Edward Coke, on the authority of Fleta, says, if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony; the father dies, both daughters being alive; the one moiety shall descend to the one daughter, and the other shall escheat. It was argued on the part of the claimant, that though one coheir could not make himself complete heir, to take under a limitation in the case of descent, the law was more favourable to coheirs. And it is so; but let the extent of the favour be marked: in the case put, the law pays attention to the real interest of the coheir, and

gives it effect by allowing, in the case of two coheirs and one attainted, where the attainder prevented the lands from descending in coparcenary, that part of the inheritance, which fairly belonged to the other coheir, to descend upon her, in the determinate form of an undivided moiety; which proves that she remained in the contemplation of the law but a coheir, entitled only to participate in the inheritance, as she would have done, if her sister had not been attainted: and the utmost favour that could be found, was to give her the benefit of that participation in the only way in which she could take it: for, according to the case of *Royston v. Reading*, reported by Mr. Serjeant Salkeld, page 242, there can be no such descent as the descent of a moiety to one coparcener as heir. Which affirms the general rule of law upon which the whole argument rests, that the title of coheirs must, in some manner or other, unite, in order to entitle any one coheir to claim as heir to the ancestor.

“I forbear troubling your Lordships farther. The answer, which the Judges submit to your Lordships, is, that supposing the claimant to have proved himself to be one of the coheirs of the barony of Beaumont, he is not entitled of right to such barony, according to the state of the pedigree last delivered on his part.”

26 June,
1795.

The House of Lords resolved and adjudged, “that it did not appear that the petitioner was then entitled to the honour, title, and dignity of Baron Beaumont.”

Printed
Cases,
Dom. Proc.
1796.

47. Mr. Stapleton presented another petition to His Majesty, representing, that having established by evidence that he was the sole heir of Joan, Lady Stapleton, and one of the coheirs of Henry first Baron Beaumont; and that, though not exclusively entitled to the said barony, he had proved himself to

be one of the rightful heirs of the said barony ; but the said barony being in abeyance, the same was in His Majesty's disposal : the petitioner therefore prayed, that His Majesty would be graciously pleased to declare, allow, and confirm to him and his heirs the said barony of Beaumont. This petition was also referred to the Attorney General, and afterwards to the House of Lords ; where it was resolved by the Committee of Privileges, that the barony of Beaumont was vested in William Viscount Beaumont, by descent from his father, John Lord Beaumont, (who was summoned to and sat in parliament 11 Hen. VI.) as a barony in fee : that the said barony remained in abeyance between the coheirs of the said William, descended from his sister Joan ; and that the petitioner was one of those coheirs.*

13 March,
1798.

48. With respect to baronies created by writs of summons to the eldest sons of peers, by the name of baronies vested in their fathers, it has been determined that they are hereditary in the blood of the persons so summoned, and descendible to their heirs ; therefore, that where the eldest son of a peer is called up to the House of Lords by writ, and takes his seat, and dies in the lifetime of his father, the dignity will descend to his son.

Descent of
Baronies
created by
Writs to the
eldest Sons
of Peers.

49. The barony of Clifford of Launsburg was granted by letters patent to the Earl of Cork and the

Barony of
Clifford of
Launsburg.

* Notwithstanding the respect which is justly due to the very learned opinion of the Judges in this case, yet it may be observed, that, as the doctrine of abeyance was originally founded on the impartible or indivisible nature of a dignity, and as all power of inheriting the barony of Beaumont, by one of the coheirs, is destroyed by the attainder, by which Mr. Stapleton is become the only person capable of enjoying it, he must be allowed to have a stronger claim on the Crown for a confirmation of the dignity, than perhaps ever existed in a coheir to a barony.

Journ.vol.25. heirs male of his body. Afterwards he was created
11—39.

Earl of Burlington. Charles, his eldest son, was called up to parliament by the title of Lord Clifford of Launsburg, in his father's lifetime; and having taken his seat under that writ, died, leaving a son, who, in 1694, claimed to be entitled to the said barony to which his father had been called, living his grandfather.

“ The Lord President reported from the Lords Committee for Privileges, to whom it was referred to consider, whether, if a lord, called by writ into the father's barony, shall happen to die in the lifetime of his father, the son of that lord so called be a peer, and hath right to demand his writ of summons? That their Lordships find no precedent in this case.”

“ A debate arising, whether Charles Lord Clifford, (son and heir of Charles late Lord Clifford, of Launsburg, deceased,) who was called by writ to parliament in the lifetime of his father, the present Earl of Burlington, hath right to sit in parliament, this House was of opinion, that the said Charles, now Lord Clifford, hath right to a writ of summons to parliament as Lord Clifford of Launsburg.” A writ of summons was issued to him, and he took his seat accordingly.

50. Where a writ of summons is issued to the eldest son of a peer, by the name of a barony not vested in his father, it operates as a new creation of a barony, and makes it descendible to all the lineal heirs, male and female, of the person so summoned.

51. In the third year of King Charles I., James, the eldest son of William Earl of Derby, was called up to the House of Lords by a writ directed *Jacobo Strange, Chevalier*, and was seated in the place of the ancient barons of Strange of Knockin, though that barony was not in his father.

Barony of
Strange,
Printed
Cases,
1736.

Journ.vol.25.
p. 11.

This title descended to William Earl of Derby, who died without issue in 1735.

James Duke of Athol, who was the heir general of William Earl of Derby, claimed the barony of Strange, created by this writ of summons ; stating, that King Henry VII. had created Thomas Lord Stanley Earl of Derby, to him and the heirs male of his body ; that the said title and dignity came by mesne descents to Ferdinando Earl of Derby, who died seised thereof, leaving three daughters ; that the said Ferdinando did not die seised of any title or dignity of a baron created by letters patent ; and whatever titles and dignities he had, which were created by any writ or writs of summons to parliament, descended to his said three daughters.

That the said title and dignity of Earl of Derby came to William, brother of the said Ferdinando, as heir male of the body of the said Thomas ; but the said William never was seised of the title or dignity of a baron.

That James, the petitioner's ancestor, whose heir he was, eldest son of the said William, was summoned in 3 Cha. I. as a baron, the writ being directed *Jacobo Strange, Chevalier* ; and being also summoned to several succeeding parliaments, sat and voted by the title of Lord Strange, in the lifetime of his father, the said William Earl of Derby.

That upon the death of the said William Earl of Derby, the said James Lord Strange succeeded to the said title and dignity of Earl of Derby, and died seised thereof, to him and the heirs male of the body of the said Thomas Earl of Derby, and of the said title and dignity of Lord Strange, to him and his heirs. And the said title and dignity of Lord Strange came by mesne descents to the then late Earl of Derby, who died without issue in 1735.

That the said James Duke of Athol was cousin and next heir to the said then late Earl of Derby, and great grandson of the said James Lord Strange, and consequent y entitled to the said title and dignity of Lord Strange.

That the only objection which had been made to his claim was, that the heralds ranked the Lord Strange in the place of the ancient barons of Knockin; from which two arguments were drawn,—1st. That the said James had no right by descent to the old barony of Strange of Knockin, because that descended to the three daughters and coheiresses of Ferdinando; and the writ of summons directed to him by the name of James Strange, Chevalier, could not operate as a new creation, because he was not ranked as puisne baron, but took an ancient place.

2d. Though the rank given by the heralds to the Lord Strange could not take from him his right to sit and vote as a lord of parliament, by virtue of the King's writ, yet it was to be looked on as an evidence, that the King thought the old barony of Strange of Knockin was in William Earl of Derby, and intended to summon the Lord Strange into his father's barony; and therefore, William Earl of Derby having no barony into which his son could be summoned, the King was deceived. To which it was answered, that the fact of Ferdinando's having left three daughters was then fully known; for it appeared by an entry on the Journals, that upon a claim made by Anne Countess of Castlehaven, the eldest daughter and one of the coheirs of Earl Ferdinando, it was ordered that the writ of summons, and the rank and place of the said James, should be no way prejudicial to the right and claim of the said Anne, or any of the daughters and coheirs of the said Ferdinando.

That the King's grant of nobility by writ of summons was not governed by any of the rules by which his gift of lands was governed at the common law. The King's gift of lands was not good, but by his letters patent, and by special words of grant. No inheritance passed from him without the word heirs; and if he was deceived in the motive which induced him to grant, his grant was void, and he might by his prerogative repeal it by *scire facias*. But if a commoner was once summoned to parliament, and sat, his blood was ennobled, and his title and dignity descended to his heirs; though the King's motive to summon him was merely personal, viz. to have his advice and counsel; though there were no words in the writ of summons from which the King's intention could be collected, to give to the person summoned the state, title, and dignity of a baron, much less to expound it an estate of inheritance. When the person summoned sat, the writ of summons had its full effect, and could not afterwards be avoided, or made not to have been. His creation into the state and dignity of a baron was by operation of law, in consequence of his once sitting, and did not depend on the King's intention; which it would be of dangerous consequence to be guessing at, after such a length of time. The only point on which such a barony depended, was, whether the person summoned sat. If he once sat in parliament, the law ennobled his blood, and gave him a barony in fee.

The House of Lords resolved, that the petitioner was entitled to the said barony of Strange, created by the said writ in 3 Cha. I. Lords Journ.
vol. 25. 39.

52. In the next year, Richard Earl of Burlington claimed the dignity of Baron Clifford; stating, that Robert de Clifford was summoned to parliament in. Barony of
Clifford,
Lords Journ.
vol. 25. 112.

Printed
Case, 1737.

22 Edw. I. as a baron, and that the said barony came by mesne descents to Henry Lord Clifford, who was created by King Henry VIII. Earl of Cumberland, to him and the heirs male of his body. That the said titles came by mesne descents to George Earl of Cumberland, who died, leaving only one daughter, the Lady Anne, by which the title and dignity of Earl of Cumberland came to Sir Francis Clifford, brother to the said George, as heir male of the body of the said Henry: but the said Francis never was seised of the title or dignity of a baron. That the said barony of Clifford descended to the said Lady Anne Clifford, from whom it descended to the daughters and coheirs of the then late Earl of Thanet. That Henry Clifford, (the petitioner's ancestor,) eldest son of the said Francis Earl of Cumberland, was summoned to parliament in the lifetime of his father, in 3 Cha. I., without any letters patent, the writ being directed *Henrico Clifford, Chevalier*, and sat and voted in that and several succeeding parliaments. That the said Henry Lord Clifford left issue only one daughter, Elizabeth, who intermarried with Richard Earl of Burlington, to which Elizabeth Countess of Burlington, the petitioner was great grandson and heir. That therefore the title and dignity created by the said writ of summons, in virtue of which the said Henry Clifford sat and voted in parliament, was descended to the petitioner, who was sole heir to the said Henry Lord Clifford.

Id. 130.

The House of Lords resolved, that the petitioner was entitled to the barony of Clifford, created by the said writ.

53. There can be no doubt but that the Crown, in the two preceding cases, issued its writs of summons upon the idea that the baronies, by the names of

which these persons were summoned, were then vested in their fathers: but this proving to have been a mistake, the House of Lords was obliged to admit that the writs operated as new creations.

54. It is observable, that in the two preceding cases the claimants stated, that the baronies by the names of which their ancestors were summoned, were not then vested in their fathers. From which it may be inferred, that an opinion then prevailed that there was some difference between the operation of a writ of summons to the eldest son of a peer by the name of a barony vested in his father, and that of a similar writ, by the name of a barony, not vested in his father.

Is the same as that of the ancient Barony.

55. This idea was probably first suggested by the "Inquiry into the Manner of creating Peers;" where, speaking of the practice of calling up the eldest son of a peer to the House of Lords by the title of a barony then in his father, the author says, — "The writ of summons therefore seems, not so much to be considered as the creation of a baron, but only as an instrument of conveyance, or method of transferring a barony or honour from one person to another. For if it is not so, what reason can be given why the eldest son of one earl, summoned by the title of his father's barony, shall have precedence according to the rank and antiquity of that barony; and that the eldest son of another earl, if he be by patent treated to a title or barony foreign to his family, shall be considered as the youngest baron; and to take his place in the House accordingly. I speak, and I think every man ought, with great submission on this subject: but, if I mistake not, the law even at this day is, that though the last of these persons takes a barony in fee or otherwise, according to the

ante, c. l. § 35.

limitations of it; yet the first, upon whom the writ operates only by way of instrument of conveyance, has no other title in the barony than his father had, from whom it was conveyed; and therefore if the father has only an estate tail in the barony, the state of the son, though summoned by writ, is not enlarged nor made a fee, and descendible to his heirs general."

The doctrine here laid down has been adopted by the House of Lords in the following case.

Barony of
Sydney,
Printed Case,
1782.

56. King James I. by letters patent created Sir Robert Sydney, Lord Sydney of Penshurst, to him and the heirs male of his body; and afterwards created him Viscount Lisle and Earl of Leicester, with the same limitations. These titles descended to his grandson Philip, whose eldest son, Robert, by curtesy Viscount Lisle, was in 1 William and Mary summoned to parliament by writ, and sat and voted under such writ by the title of Lord Sydney of Penshurst, in the lifetime of his father. These titles descended to John Sydney the son of Robert, who died without issue, leaving the two daughters of his next brother, Mary and Elizabeth Sydney, his heirs general, and Jocelyne his youngest brother, his heir male; who became Earl of Leicester, and afterwards died without issue, by which the dignities limited to the heirs male of Sir Robert Sydney became extinct.

Upon the death of Mary Sydney without issue, Elizabeth her sister, who had married Mr. Perry, claimed the barony of Penshurst, as the sole heir of Robert Sydney, who was summoned to parliament by writ.

The Attorney General (Mr. Wallace) stated in his report, that the petitioner claimed the barony of Sydney of Penshurst, as being the sole heir general of

the body of Robert Sydney, who was called to parliament by writ *in vita patris* : upon a supposition that the effect and operation of the writ of summons to parliament, without letters patent, and his having sat in parliament in pursuance thereof, vested a title in him to the barony, descendible to his lineal heirs. That a writ of summons to parliament, and a sitting in pursuance, did certainly, in general cases, ennoble the person and his descendants : but he conceived that the effect of a writ of summons to the eldest son of an earl or viscount, by the title of his father's barony ; or to the eldest son of a baron, who had two or more baronies, to one of his father's baronies ; was to accelerate the succession of the son to the barony, which, on his father's death, would descend to him : and the extent of the inheritance depended upon the nature of his father's title to the barony, whether in fee or in tail male. That the usual manner of calling up the son of a peer *in vita patris*, was, by writ of summons to the barony of the father ; and the persons thus called had been constantly placed in the House of Lords according to the antiquity of their father's barony. Although, since the statute 31 Hen. VIII. c. 10. for placing the Lords, whereby the precedence of Peers was fixed and established, the right to such precedence had at different times come under the consideration of the House ; and although it did not appear that the House had determined the point ; yet it was highly probable that the Lords had satisfied themselves, that the eldest sons of peers, called up by writ into their fathers' baronies, were entitled to the same precedence and rights, which they would have been entitled to, if they had succeeded to the same by descent ; and that the calling

Lords Journ.
vol. 4. 35.
vol. 15. 523.

them up by writ in their father's lifetime only accelerated the possession.

That he was of opinion that the effect of a writ of summons to Robert Sydney, to his father's barony, gave to him the like inheritance his father had in the barony, which was restrained to heirs male : and that the petitioner was not, as heir general, entitled to the barony : but as the case appeared anomalous, and never to have been precisely determined, he thought it adviseable to refer it to the House of Peers.

The case was accordingly referred to the House of Peers ; and on the part of the claimant it was insisted, that a writ of summons to parliament, directed to any temporal person, who sits in pursuance of it, although it contains no words of limitation, ennoble the person to whom it is directed, and his lineal descendants, or, as it has been sometimes expressed, gives a barony in fee, was a general rule of law, so fully established, and was so little liable to be controverted, that it was presumed to be unnecessary to refer to the innumerable authorities contained in the books of law, and the resolutions of the House of Peers, in support of it.

The claim must therefore be admitted, unless it could be shown, that the effect of a writ of summons, directed to the eldest son of an earl or viscount, by the same title as that of his father's barony ; or to the eldest son of a baron, who had two or more baronies, by a name the same as that of one of his father's baronies ; was different from the effect of a writ of summons directed to other commoners. The Attorney General had adopted a notion of this sort, and stated in his report, that the effect of a writ of summons in such cases was, to accelerate the succession of the son to the barony, which, on his

father's death, would descend to him; and that the extent of the inheritance depended on the nature of his father's title to the barony, whether in fee or in tail male.

It was admitted by the Attorney General that a writ of summons so addressed, if its effect was such, formed an anomalous case, and a case which had never been precisely determined. It was contended further, that this doctrine of acceleration was perfectly novel; that it never occurred before to any of the great lawyers of this country, that a writ of summons in such cases, had such an operation; and that there was nothing of authority to be found in any law book, or in the Journals of Parliament, to countenance the notion. The practice of thus calling to parliament the sons of peers was stated by the report to have existed as far back as the reign of Edw. IV.; and if the doctrine of the report could be maintained, it was extremely singular that every lawyer who, since the law of parliament upon this subject had been considered as settled, had treated upon the effect of a writ of summons to parliament, in which there were no words of limitation, (with exception only of the author of a tract upon the ante, c. 1. origin and manner of creating peerages; whose § 35. reasoning the report seemed to abandon, though it adopted the result of it; and who contended against many of the most acknowledged principles of the law relating to peerages,) should have stated in general terms, without reserve, qualification, or exception, that such a writ operated to ennoble the person to whom it was directed, if he sat in consequence of it, and his lineal descendants. By all writers of authority it had been observed, that letters patent, in which there were no words of limitation, gave the

grantee a dignity for life only ; but it did not seem to have occurred to any such writer, that a writ of summons, where there were no such words, could enure to the person to whom it was addressed, for his life only ; or could enure, where there were not special words in the writ, so to direct the course of the inheritance, to him and his heirs male, or any other particular line of descendants. It might be safely assumed that the doctrine was not to be found in any law book of authority ; and was so extremely singular, that it might be very confidently asserted, that if the law acknowledged the doctrine, it could not have been unknown or unnoticed by the several great lawyers who had considered the nature and effect of these writs.

The House of Lords resolved, that the claimant had no right in consequence of her grandfather's summons and sitting.

Descent of
Dignities
created by
Letters
Patent.

57. It has been stated in a former chapter, that where a dignity is created by letters patent, the state of inheritance must be limited by apt and proper words, or else the grant is void : and where the mode of descent is marked out, the dignity will of course be transmissible to that class of heirs who are designated in the letters patent. Thus under the common patents the dignity descends to the heirs male of the body of the person first ennobled.

58. A person claiming a dignity of this kind must deduce his pedigree entirely through males ; but a brother of the half blood may inherit : for Lord Coke says, the issue in tail is ever of the whole blood to the donee.

1 Inst. 15 b.

59. By letters patent in 16 Cha. I., William Howard and Mary his wife, the only sister and heir of Henry Baron Stafford, were created respectively Baron and

Baroness of Stafford, to hold respectively to the same William and Mary, and the heirs male of the bodies of the same William and Mary lawfully begotten, or to be begotten; and for default of such issue, then to the heirs of the bodies of the same William and Mary lawfully begotten, or to be begotten.

60. The most singular limitation of a dignity, which I have seen, is that of the barony of Lucas of Crudwell. It was granted by letters patent, 15 Cha. II., to Mary Countess of Kent, to hold to her and the heirs male of her body begotten by the Earl of Kent; and for want of such issue to the heirs of her body by the said earl, with a declaration, "that if at any time or times after the death of the said Mary Countess of Kent, and in default of issue male of her body by the said earl begotten, there shall be more persons than one, who shall be coheirs of her body by the said earl, the said honour, title, and dignity shall go, and be held and enjoyed, from time to time, by such of the said coheirs, as by course of descent of the common law should be inheritable to other entire and undivisible inheritances, as, namely, an office of honour and public trust, or a castle for the necessary defence of the realm, or the like, in case any such inheritance was given or limited to the said Mary, and the heirs of her body by the said earl begotten." And by a private act of parliament, 15 Cha. II., this declarative clause is ratified and confirmed.

61. The dukedom of Marlborough is limited to the eldest daughter, in default of males, by the letters patent; which are confirmed by an act of parliament, 5 Ann. c. 3.

TITLE XXVII.

FRANCHISES.

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|-------------------------------------|----------------------------------|
| 1. <i>Nature of.</i> | 65. <i>Treasure Trove.</i> |
| 3. <i>A Forest.</i> | 67. <i>Royal Fish.</i> |
| 12. <i>A Chace.</i> | 68. <i>Goods of Felons.</i> |
| 18. <i>A Park.</i> | 69. <i>Deotlands.</i> |
| 22. <i>A Free Warren.</i> | 72. <i>A Hundred.</i> |
| 31. <i>A Free Fishery.</i> | 74. <i>Fairs and Markets.</i> |
| 41. <i>A Manor.</i> | 83. <i>How Franchises may be</i> |
| 42. <i>Rights of the Lord as to</i> | <i>claimed.</i> |
| <i>Game.</i> | 85. <i>How they may be lost.</i> |
| 47. <i>A Court Leet.</i> | 86. <i>Reunion in the Crown.</i> |
| 49. <i>Waifs.</i> | 88. <i>Surrender.</i> |
| 58. <i>Wreck.</i> | 89. <i>Misuser.</i> |
| 59. <i>Estrey.</i> | 93. <i>Nonuser.</i> |

SECTION 1.

Nature of,

A FRANCHISE is a royal privilege or branch of the King's prerogative, subsisting in a subject, by a grant from the Crown. Formerly grants of royal franchises were so common, that in the parliament which was held in 21 Edw. III. there is a petition from the Commons to the King, stating that franchises had been so largely granted in times past, that almost all the land was enfranchised, to the great *averisement* and *estenysement* of the common law, and in great oppression of the people; praying the King to restrain such grants for the time to come. To which the King answered, that the franchises which should be granted in future, should be made with good advisement.

Rot. Parl.
vol. 2. 16.

2. Franchises are extremely numerous, and of various kinds; but only some of those will here be

treated of, which are immediately annexed to, or connected with real property.

3. It is laid down by Sir W. Blackstone, that, upon the Norman conquest, the right of pursuing and taking all beasts of venery, or such other animals as are accounted game, was then held to belong to the King; or to such only as were authorized under him.

A Forest.
2 Comm. 415.

This doctrine appears to be founded on very ancient and respectable authorities. Ordericus Vitalis says of King Henry I., *Omnem ferarum venationem totius Angliæ sibi peculiarem vindicavit; et vix paucis nobilibus ac familiaribus privilegium, in propriis saltibus, venandi permisit.* And we find the following passage in Mat. Paris, anno 1209, *Rex Anglorum Johannes, ad natale domini, fuit apud Bristolium, et ibi capturam avium per totam Angliam interdixit,*

Duchene
Script. Norm.
823.

4. These regulations were probably made in consequence of some violations of the King's rights, respecting game. For Bracton states the royal prerogative in the following words: *Habet etiam, (Rex) de jure gentium in manu sua quæ de jure naturali deberent esse communia; sicut feras bestias, et aves non domesticas.* And Manwood, upon the authority of this passage, says, "In like manner wild beasts of venery, and beasts and fowls of chace and warren, being things of great excellency, they are meetest for the dignity of a prince, for his pastime and delight; and therefore they do most properly belong unto the King only."

Lib. 2. c. 24.

c. 2. § 1.

5. In consequence of this prerogative, the first monarchs of the Norman line not only reserved to themselves the sole and exclusive property of the ancient forests, but also created others of great extent over the lands of private persons, which they placed under the jurisdiction of particular courts;

and enacted laws of the most arbitrary and cruel kind for the preservation of the game therein.

6. The practice of afforesting the lands of private persons, being highly destructive of their properties, was remedied by the *charta de foresta*, 9 Hen. III., which enacted that all the lands which had been afforested by King Hen. II., Richard I., and John, except the proper demesnes of the Crown, should be disafforested and freed from the forest laws.

7. Manwood defines a forest to be—"A certain territory or circuit of woody grounds and pastures, known by its bounds and privileges, for the peaceable being and abiding of wild beasts and fowls of forest, chace, and warren; to be under the King's protection, for his princely delight; replenished with beasts of venery and chace, and great coverts of vert, for the succour of the said beasts: for preservation whereof there are particular laws, privileges, and offices belonging thereto."

4 Inst. 303.

8. The lands added to the royal forests by King Henry II. and his sons, and which were disafforested by the *charta de foresta*, are called purlieus. But though exempted from the forest laws, so that the proprietors of such districts may occupy them as their freehold, yet as to some purposes, they have the privileges of a forest against strangers.

9. Beasts of forest are properly hart, hind, hare, boar, and wolf: but all beasts of venery are equally protected in a forest; for it comprehends within it a chace, park, and free warren.

10. Several of the royal forests were granted by the Crown to great lords, by which they acquired the royal franchise of a forest. Thus, in 5 Ja. I., all the justices and barons held, that a forest may well be in the hands of a subject; and shall be used as a forest;

Case of
Leicester
Forest, Cro.
Ja. 155.

if the King gives authority by express words, for the administration of justice there, and for his justices to come there; and if such grantee might have commission, in such case, to use and have officers of a forest, then it should continue a forest in the hands of a subject.

11. Part of the land and wood comprised in a forest, may belong to private persons: but they can only occupy and enjoy the same in such manner as is consistent with the rights of the proprietor of the franchise of forest, and the preservation of the game. 4 Inst. 297. Cro. Ja. 155.

12. A chace is a franchise or liberty of keeping certain kinds of wild animals within a particular and known district; with an exclusive right of hunting them therein. It is in most respects similar to a forest; the only difference between them being, that a chace has no laws peculiar to it; so that all offences in chaces are punishable by the common law, and not by the forest laws. A Chace. 2 Comm. 417.

13. Beasts of chace are buck, doe, fox, martin, and roe, in which the owner of the chace has a property.

14. Where a chace belongs to a subject, it must have been originally created by a royal grant from the Crown, giving to the grantee the franchise of chace over a certain tract of ground, or by a grant of a royal forest to a subject, but without any words enabling him to hold courts; in which case the forest became a chace. 4 Inst. 314.

15. From a variety of causes, unknown to modern times, chaces extended over the lands of other persons. And in 5 Ja. I., it was resolved, that persons having freehold lands within a royal chace might cut their timber and wood growing there, without the Case of Forests, 12 Rep. 22. 4 Inst. 298.

view or licence of any: but if they cut so much that there was not sufficient for covert, to maintain the game of the King, they should be punished. So if a common person had a chace in another's soil, the owner of the soil could not destroy all the wood; but must leave sufficient covert and browse wood, as had been accustomed.

4 Inst. 301.

16. Lord Coke says, no King of England could have made a chace for himself in any of the grounds of his subjects. And that when King Henry VIII. determined to make a chace about his palace at Hampton Court, he was obliged to obtain the previous consent of the freeholders and customary tenants, over whose lands the chace was to extend.

31 Hen. 8.
c. 5. Stat. at
Large, Fol.
Ed. 1817.

17. The erection of this chace was confirmed by an act of parliament, which recites the indenture made between the King and the freeholders and customary tenants of the neighbouring townships, in which it was stipulated that they should have liberty to cut their woods within the chace, without the King's licence; and to fence against the deer, while their corn was growing: but that after the corn was carried, the officers of the chace should be allowed to make deer lepes, and brekes in the fences, that the deer might enter the ground, where the corn had been sown, for their feeding, while the land remained unsown; and that in other respects the proprietors should obey the laws of the chace. And for recompence, it was agreed that a third of the rent of the freeholds, and a moiety of the fine of every copyholder, should be deducted.

A Park.
1 Inst. 233 a.
2 — 199.

18. A park is an inclosed chace, extending only over a person's own grounds, privileged for beasts of venery, and beasts of forest and chace, by the King's grant or by prescription: and it appears from the

ordinatio de libertatibus perquirendis, that those who would purchase a new park should have writs of inquiry out of Chancery, and there make fine for the park having. Stat. at Large, Fol. Ed. 1810.

19. To a park three things are necessary: 1. A grant from the King. 2. Inclosures by pale, wall, or hedge. 3. Beasts of park, such as buck, doe, &c. And where all the deer are destroyed, it shall no more be accounted a park. For a park consists of vert, venison, and inclosure; and if it is determined in any of these, it is a total disparking. 11 Rep. 87 b. Cro. Car. 60.

20. Manwood says, there are parks in many forests, which are claimed either by grant from the King, or by prescription. That if a subject is owner of a forest, he may give licence to another to inclose a park within the meers of his forest; to hold the same so inclosed, with all such venison as the grantee shall put in, to him and his heirs. But if such park is so slightly inclosed, that the wild beasts of the forest get into it, the lord of the forest may, in that case, enter and hunt at his pleasure.

21. Parks, as well as chaces, are subject to the common law, and not governed by the forest laws: but by the statute of Westm. I. 3 Edw. I. c. 20., trespassers in parks are made liable to very severe punishments. 4 Inst. 314. 2 Inst. 198.

22. A free warren is a franchise to have and keep beasts and fowls of warren within the demesnes of a manor, or other known place; from which the owner of the warren has a right to exclude all other persons from hunting or taking them. This franchise, like that of chase or park, must be derived from a royal grant, or from prescription, which supposes such a grant; it being laid down in the case of monopolies, 44 Eliz., that "none can make a park, chase, or A Free Warren. 11 Rep. 87 b.

warren, without the King's licence. For that is, *quodammodo* to appropriate those creatures which are *feræ naturæ, et nullius in bonis*, to himself; and to restrain them of their natural liberty." And it appears from the *ordinatio de libertatibus perquirendis*, that those who would purchase a free warren should make fine for it, in the same manner as for a park.

ante, § 18.

c. 4. § 3.

23. Manwood says, the words constituting a free warren usually were—*Quod ipse et hæredes sui habeant liberam warrenam in omnibus dominicis terris suis in N. in comitatu B. dum tamen feræ illæ non sint infra metas forestæ nostræ; ita quod nullus intret terras illas, ad fugandum in eis, vel aliquod capiendum quod ad warrenam pertinet.* And it appears from Dugdale's Baronage, that during the reigns of the three first Edwards, an infinite number of grants of this kind were made to the principal nobility, from which

2 Comm. 417. Sir W. Blackstone concludes that the sole right of taking and destroying game belonged exclusively to the King; for otherwise he could not grant it to his subjects.

24. The beasts of warren are hares and rabbits, and the fowls of warren are pheasants and partridges; and the effect of a grant of free warren is, to vest in the grantee the property of these beasts and fowls that are on the lands comprised in the grant; which property continues after they are hunted out of the warren. And although it is said that a person may have a property in wild animals, *ratione soli*, yet it is admitted that this property is subservient to that of a person having the franchise of warren, which is *ratione privilegii*, and suspends it; for in that case the property of the wild animals is in the person having the warren, and not in the proprietor of the soil.

Fitz. N. B.
86. L. n.

Sutton v.
Moody,
12 Mod. 144.

25. The grantee of a free warren acquired also a right to appoint a person to watch over and preserve the game, called a warrener ; who is justifiable in killing any dogs, polecats, or other vermin which he finds disturbing or destroying the game. Cro. Ja. 45.

26. The Crown could not grant free warren over the lands of another ; but still a person might have free warren over another's land by prescription. Year Book,
34 Hen. 6.
pa. 28.

Thus in a case upon a *quo warranto* in 9 Cha. I. the defendant claimed free warren in R., and pleaded that he was seised in fee of the manor of R. whereof the *locus in quo*, &c. was parcel ; and so prescribed to have free warren within all the said manor, and the demesnes thereof, so that none should chase any game in the said manor, and the demesnes thereof without his leave. Issue was taken that he and all those whose estate, &c., had no free warren within the said manor and demesnes ; and found for the defendant. It was objected that this prescription was not good, viz. to have free warren in the manor, and in the demesnes of the manor ; for though he might prescribe to have it in his own demesnes, yet he could not prescribe to have it in the lands of others his freeholders. But to this it was answered by Roll (counsel for the defendant), that a prescription to have free warren in his manor is good, as well in the lands of freeholders, as in the demesnes. For being by prescription, it shall be intended that this liberty was before there were any freeholders ; whose estates were afterwards extracted out of the demesnes of the manor. Rex v. Talbot,
Cro. Car. 311.

No judgement was given, but Roll's doctrine is admitted in several cases stated by Brooke, and in a case reported by Bulstrode. Fowler v.
Seagrave,
Bulst. 254.

Bro. Ab. Tit.
Warren, 3.
Dyer, 30 b.
pl. 209.

27. Other circumstances might also give rise to a free warren over another's land. Thus a person having free warren over certain lands may alien the lands, reserving the warren. But if he alien the lands without the warren, and without reserving it to himself, it is determined and gone : for the alienor has parted with his right to the land discharged of all things, so that he cannot have it; nor does the alienee take it, because it was not granted to him, but only the land.

28. A person may have a warren by prescription in a forest ; but in that case there must be an allowance of it in eyre, that is, in the court of the forest; and then a grant is presumed.

Harrison's
Case,
W. Jones,
280.

29. Sir R. Harrison claimed a warren in Windsor Forest at the justice seat. But it not being allowed in eyre, he was fined ten shillings, and the warren was ordered to be destroyed.

4 Inst. 318.

30. Lord Coke says, a man may have a chace, as belonging to his manor, in his own woods, as well as a warren or park in his own grounds. For the chace, warren, or park, are collateral inheritances ; and not issuing out of the soil, as common does. Therefore if a person has a chace in another's grounds, and purchases the ground, the chace remains.

A free
Fishery,
Davies Rep.
152.

31. It is laid down, in the case of the fishery of the river Bann, that every navigable river, as far as the sea flows and ebbs in it, is a royal river, and the fishery of it, a royal fishery, belonging to the King by his prerogative. This doctrine is however denied in subsequent cases, in which it is held that every subject may fish, with lawful nets, in a navigable river ; that the King's grant cannot bar them of that right, because the exclusive right of the Crown only

Warren v.
Mathews,
6 Mod. 73.
1 Salk. 357.
1 Mod. 105.

extends to royal fish ; namely, whale and sturgeon : and that the same rule is applicable to arms of the sea.

32. With respect to rivers that are not navigable, the proprietors of the banks on each side have an interest in the fishery, of common right. So that every inland river that is not navigable, appertains to the owners of the soil. Where such rivers run between two manors, and are the meers and boundaries between them, one moiety of the river and fishery belongs to one lord, the other to the other. Davies R. 155.

33. It is said by Lord Hale, in his treatise *De jure maris*, that though *prima facie* an arm of the sea be in point of propriety the King's, and common for every subject to fish there ; yet a subject may have by usage a several fishery there, exclusive of that liberty which otherwise of common right belongs to all the King's subjects ; and this doctrine is confirmed by the following case. Hargrave's Tracts, 19.

34. An action of trespass was brought by the plaintiff for entering his close, called the River Severn. The defendant pleaded that it was a navigable river ; and also that it was an arm of the sea, wherein every subject had a right to fish. The plaintiff, without traversing these allegations, replied, that this was a part of the manor of Arlingham ; that a Mrs. Yates was seised of that manor, and prescribed for a several fishery there. Carter v. Murcott, 4 Burr. 2162.

Issue being joined thereon, a verdict was found for the plaintiff. On a motion in arrest of judgement, on the ground that an exclusive right could not be maintained by a subject, to fish in a river that was an arm of the sea ; the general right of fishing in a navigable river, or arm of the sea, being common to all.

Lord Mansfield said, the rule of law was uniform. In rivers not navigable, the proprietors of the land had the right of fishery on their respective sides; and it generally extended *ad filum medium aquæ*. But in navigable rivers the proprietors of the land on each side had it not: the fishery was common; it was *prima facie* in the King, and was public. If any one claimed it exclusively, he must show a right. If he could show a right by prescription, he might then exercise an exclusive right; though the presumption was against him, unless he could prove such a prescriptive right. Here it was claimed and found. It was therefore consistent with all the cases that the plaintiff might have an exclusive privilege of fishing; though it were an arm of the sea. Such a right should not be presumed, but the contrary, *prima facie*; it was however capable of being proved, and must have been so in this case. The rule was discharged.

35. It appears highly probable that all the free fisheries are derived from royal grants, made at the time when the sole and exclusive right of fishing in arms of the sea and navigable rivers was supposed to be vested in the Crown. Therefore a free fishery or exclusive right of fishery, in an arm of the sea, or navigable river, is described by Sir W. Blackstone to
 2 Comm. 39. be a royal franchise, which is now frequently vested in a private person, either by a grant from the Crown or by prescription.

Idem. 36. This right, says the same author, was probably first claimed by the Crown upon the establishment of the Normans; and was deemed an usurpation by the people: for by King John's *magna charta*, c. 47, it was declared, that where the banks of rivers had been first defended in his time, they should be laid open,

And in the charter of 9 Hen. III. c. 16. it is promised, that no banks should be defended from thenceforth, but such as were in defence in the time of King Henry his grandfather, by the same places and the same bounds as they were wont to be in his time. Although it is said in the Mirror that this statute was then out of use, yet Sir W. Blackstone observes, that in consequence of it, a franchise of free fishery ought now to be at least as old as the reign of King Henry II.

37. Sir W. Blackstone also says, that a right of free fishery does not imply any property in the soil; in which respect it differs from a several fishery: and that, from its being an exclusive right, it follows, that the owner of a free fishery has a property in the fish before they are caught.

38. Mr. Hargrave observes, that both parts of this description of a free fishery seem disputable; and that though, for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers, by derivation from the Crown, and though in other countries it may be so considered, yet from the language of our books, it seems as if our law practice had extended this kind of fishery to all streams, whether private or public; neither the Register nor other books professing any discrimination. That in one case the Court held free fishery to import an exclusive right, equally with several *piscary*; chiefly relying on the writs in the Register, 95 *b*. But this was only the opinion of two Judges against one, who strenuously insisted that the word *libera ex vi termini* implied common. That many judgements and precedents were founded on Lord Coke's so construing it. That the dissenting Judge was not wholly unwarranted in

1 Inst. 122 a.
n. 7.

Smith v.
Kemp,
Salk. 637.

Upton v.
Dawkins,
3 Mod. 97.
Peake v.
Tucker,
Carth. 286.

the latter part of his assertion, appears from two determinations a little before the case in question. To these might be added the three cases cited by Lord Coke, as of his own time; and there were passages in other books which favoured the distinction.

Weld v.
Hornby,
7 East, 195.

39. It is laid down by Lord Ellenborough, in a modern case, that the erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances, were treated as such by *magna charta* and subsequent acts, which forbid the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. That the stells erected in the river Eden by Lord Lonsdale and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced to be illegal, and a public nuisance. The Court also held, that where a weir had formerly been made of brushwood, through which it was possible for the fish to escape into the upper part of the river, it could not be converted into a stone weir, whereby the possibility of escape was debarred; though, in flood times, the fish might still overleap it. And however 20 years acquiescence might bind the parties, whose private rights only were affected, yet the public had an interest in the suppression of public nuisances, though of longer standing.

Ward v.
Creswell,
Willes R.
265.

40. It should, however, be observed, that the right of fishing in the sea, is a right common to all the King's subjects; therefore a prescription for such a right, as annexed to certain tenements, is bad.

A Manor,
Diss. c. 3.
§ 32.

41. The origin of manors has been already stated; and it has been shown that they are feudal seigniories, accompanied with royal franchises; their essence

consisting in the lord's right to hold a court for the administration of justice; which is a part of the King's prerogative, that must have been originally derived from the Crown.

42. Whenever the King granted a tract of land to a subject, with a jurisdiction, a right of hunting over it followed as a regular consequence, and as appurtenant to the royalty, in conformity to the practice then existing upon the Continent; for, by the customary law of France, every person who had a fief had a right of hunting over the lands comprised within it. And it appears, from the following case, that every lord of a manor in England had, and still has, a right of sporting over it.

Rights of the
Lords as to
Game.

Loisel, Inst.
Lib. 2. Tit. 2.
§ 51.

43. In a prosecution for a penalty under the game laws, the case was, that a person who was lord of a manor, of which the demesnes were leased out for 99 years, at a rent of 15*l.*, killed a pheasant out of his manor; and it was contended for the plaintiff, that the defendant had not a qualification of 100*l.* a year, and was therefore liable to a penalty.

Mallock v.
Eastly,
7 Mod. Rep.
482.

Serjeant Eyre, for the defendant, said, that every lord of a manor was qualified to kill game. The proprietors of manors generally were barons, and the manor itself composed of demesnes and a court baron. In modern times, indeed, several persons had manors without any lands; the demesnes having been sold, and disannexed. But the property of a manor, dismembered of its rents and services, was still considered as a royalty or jurisdiction, so favoured, as to entitle its master to many privileges; and among the rest, to that of killing game. That by the stat. 22 & 23 Cha. II. c. 25., reciting, that divers disorderly persons betook themselves to destroying game, to the prejudice of noblemen, gentlemen, and lords of

manors, it is enacted, that all lords of manors or other royalties, not under the degree of an esquire, may authorize gamekeepers, within their royalties or manors, to seize all guns, &c. for the killing of game within the precincts of such manors, &c.

That if, by this statute, lords of manors might authorize gamekeepers to kill game,* and to seize guns, &c., it would be absurd to say, that the lord of the manor had not such power himself; for it would be degrading him below the privileges of his servant. And why did the statute authorise lords to make gamekeepers to preserve the game, unless they themselves had an interest in it, and power to take and destroy it, and seize the guns of unqualified persons. But it was clear and settled that they might carry guns and kill game within their respective manors.

Lord Ch. J. Willis said, if the defendant was not qualified as being a lord of a manor, he certainly was not so by his estate. But he had some doubt whether the defendant, as lord of the manor simply, was not qualified to kill game within his own manor. It seemed a little odd, that the servant of the lord of a manor might kill game, and yet the lord himself not do it, without being punished by a penalty.

Mr. Just. Abney said, there were three qualifications in force; one of which every man must have, to be entitled to kill game. The first was of lords of manors, who have not a general qualification to kill game every where, but are confined to the precincts

* This is a mistake of the reporter; but the statute 5 Anne, c. 14. § 4., which the Serjeant probably cited, enacts, that lords and ladies of manors may empower gamekeepers upon their own manors to kill hare, pheasant, or partridge, or any other game, for the use of such lord or lady only.

of their own manors ; so that it should be considered whether the defendant had not incurred the penalty, as he killed the pheasant out of his manor. The second sort of persons were those who had titles, as esquires, &c. These were qualified to kill game, whether they were possessed of lands or not. The third sort were persons having estates. And he was quite satisfied that the estate of the defendant would not qualify him.

Mr. Just. Bennett was clear that the estate was no qualification, but had some doubt as to the other point. For though he imagined that the lord of a manor was entitled to kill within his manor, as well as his gamekeeper, yet he thought he would be liable to the penalty, if he used a gun to destroy the game, out of the boundaries of his manor.

No judgement was given ; but it appears quite clear, from the reasoning of the Judges, that if the defendant had killed the pheasant on his own manor, the Court would have held that he was not liable to the penalty, notwithstanding his want of a qualification of property.*

44. The lord's right of killing game being part of his royalty, must originally have extended over all the lands comprised within the manor. But we find it established in the reign of Queen Anne, that a lord 11 Mod. 74. of a manor could not enter upon the freehold estate of another, though situated within the bounds of his manor, for the purpose of sporting.

* There are some other acts of parliament which recognize the rights of lords of manors to the game. Vide 23 Eliz. c. 10. § 2. 4 & 5 William and Mary, c. 23. § 4.

5 Rep. 104 b. 45. The lord of a manor may erect a dove-cote *de novo* on his land, being parcel of the manor, and store it with pigeons.

46. There are a variety of other franchises usually annexed to manors: the principal of which are, the right to hold a court leet; and to have waifs, wrecks, estrays, treasure trove, royal fish, goods of felons, and deodands: all which were originally granted by the Crown to the persons entitled to those manors; and became appendant to them.

A Court Leet. 47. A court leet is a court of record, having the same jurisdiction, within some particular precinct, which the sheriff's tourn has in the county. It is not necessarily incident to a manor, like a court baron; but is derived from the sheriff's tourn, being a grant from the Crown to certain lords of manors, for the ease of their tenants, that they might administer justice to them at home.

Colebrook v. Elliot,
3 Burr. 1859.

48. To every court leet is annexed the view of frankpledge; which means the examination or survey of the frankpledges, of which every man, not particularly privileged, was antiently obliged to have nine, who were bound that he should always be forthcoming, to answer any complaint.

Waifs.
Foxley's
Case,
5 Rep. 109.

49. Waifs are goods which have been stolen and waived; or left by the felon on his being pursued, for fear of apprehension. Thus, if a felon who is pursued waives the goods; or thinking that he is pursued, flies away, and leaves the goods behind him; the King's officer, or the bailiff of the lord of the manor, who has the franchise of waif, may seize the goods, to the King's or the lord's use, and keep them: unless the owner makes a fresh pursuit after the felon, and sues an appeal of robbery, within a year

and a day ; or gives evidence against him, whereby he is attainted, &c. ; in which case the owner shall have restitution of his goods so stolen and waived.

50. The reason that waifs are forfeited, and that the person from whom they were stolen shall lose his property in them, is on account of his default in not making fresh suit, to apprehend the felon ; for which the law has imposed this penalty on the owner. 5 Rep. 109 a.

51. Though waif is generally spoken of goods stolen, yet, if a person be pursued with hue and cry as a felon, and he flies and leaves his own goods, these will be forfeited as goods stolen. But they are properly fugitive's goods, and not forfeited till it be found before the coroner, or otherwise by record, that he fled for the felony. 3 Hawk.
P. C. 450.

52. If the thief had not the goods in his possession when he fled, there is no forfeiture : for if a felon steals goods, hides them, and afterwards flies, there is no forfeiture. So where he leaves stolen goods any where, with an intent to fetch them at another time, they are not waived. And in these cases, the owner may take his goods where he finds them. 5 Rep. 109 a.

Cro. Eliz.
694.

53. Wreck signifies such goods as, after a ship has been lost, are cast upon the land ; for they are not wrecks as long as they remain at sea, within the jurisdiction of the Admiralty. And by the statute of Westminster the first, 3 Edw. I. c. 4. it is enacted, that when a man, or any living creature, escapes alive out of a ship that is cast away, whereby the owner of the goods may be known, the ship or goods shall not be a wreck. Wreck.
Constable's
Case,
5 Rep. 106.

2 Inst. 166.

54. If a ship is pursued by an enemy, and the mariners come ashore, leaving the ship empty, and Idem, 167.

she comes to land without any person in her; yet she is not a wreck, but shall be restored to the owners.

Idem.

55. By the common law all wrecks belong to the King, in consequence of the dominion he has over the seas; for being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of merchants. This is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who in shipwrecks approach the shore, by removing the temptations to inhumanity. This right however may, and often does, belong to lords of manors, having the franchise of wreck; by grant from the Crown, or by prescription.

Cases and
Opinions,
Vol. 2. 452.

2 Inst. 166.

56. The right to wreck is confirmed by the statute of Westminster the first, which enacts, that where the ship or goods are deemed a wreck, they shall belong to the King, and be seized by the sheriffs, coroners, or bailiffs; and shall be delivered to them of the town, who shall answer before the justices of the wreck belonging to the King: and where wrecks belong to another than the King, he shall have it in like manner.

5 Rep. 106 a.

57. *Flotsam* is where a ship is sunk, or otherwise perished, and the goods float on the sea. *Jetsam* is when the ship is in danger of being sunk; and to lighten her, the goods are cast into the sea, and afterwards the ship perishes. *Lagan*, or rather *Ligan*, is when the goods are so cast into the sea, and afterwards the ship perishes; and such goods are so heavy that they sink to the bottom; and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again. *Et dicitur ligan a ligando.* None of these goods which are called *Jetsam*, *Flotsam*,

or *Ligan*, are called wreck, so long as they remain in or upon the sea; but if any of them, by the sea, be put upon the land, then they shall be deemed wreck.

58. If a person has a right, either by grant or prescription, to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it: and the very possession of the wreck is in him that has such right, before any seisure. Anon.
6 Mod. 149.

59. An estray is a beast that is tame, found within a manor, owned by no one; in which case, if it be proclaimed according to law, at the two next market-towns, on two market-days, and is not claimed by the owner within a year and a day, it becomes the property of the lord of the manor, if entitled to this species of franchise. Estray.

60. If the beast strays into another manor within the year, after it has been an estray, the first lord cannot retake it; for till the year and day be past, and proclamations made, he has not acquired a property in it; therefore the possession of the second lord is good against him. Bro. Ab.
Estray, pl. 11.
contra
12 Rep. 101.

61. If the beast be not regularly proclaimed, the owner may take it at any time. And where a beast is proclaimed as the law directs, if the owner claims it within the year and day, he shall have it again, upon paying for its keep. 1 Roll. Ab.
879.

62. If the beasts of an infant, feme covert, or person in prison, or beyond sea, stray, and are proclaimed according to law; if none claim them within a year and a day, they shall be all bound, and become the property of the lord. 5 Rep. 108 b.

63. If any animal belonging to the King strays into the manor of a subject, it will not be liable to forfeiture: for the grant of the King cannot be sup- 1 Roll. Ab.
888.

posed to intend farther than his prerogative, which is, to take the cattle of common persons.

Cro. Ja.
148.

64. A beast estray is not to be used in any manner, except in case of necessity, as to milk a cow; but not to ride a horse.

Treasure
Trove.
2 Inst. 577.
3 — 132.

65. Treasure trove is where any money is found hid in the earth, and no one knows to whom it belongs; in which case it becomes the property of the lord of the manor, having this franchise. But if the owner may any ways be known, it belongs to him. As to the place where the finding is, it seems not material, whether it be hidden in the ground, or in the roof or walls, or other part of a castle, house, building, ruins, or elsewhere.

Idem.

66. Nothing is said to be treasure trove but gold and silver: and it is the duty of every person who finds any treasure of this kind, to make it known to the coroners of the county: for the concealing of it is punishable by fine and imprisonment.

2 Hawk.
P. C. 67.

Royal Fish.

67. Royal fish consist of whale and sturgeon, to which the King, or those entitled by grant from him, or by prescription, have a right, when either thrown on shore, or caught near the coast. This right is declared by the stat. 17 Edw. II. c. 11. *De prerogativa Regis.*

Goods of
Felons.
5 Rep. 110 b.

68. Goods of felons who fly for felonies, are forfeited to those lords of manors who have royal franchises; when the flight is found on record. These are usually called goods of persons put in *exigent*: for where a person is appealed or indicted of felony, and withdraws or absents himself for so long time that an *exigent* is awarded against him, he forfeits all the goods and chattels which he had at the time of the *exigent* awarded; although he renders himself on the *exigent*, and is acquitted.

69. Where a person comes to a violent death by mischance, the animal or thing which was the cause of his death becomes forfeited, and is called a *deodand*, as if given to God to appease his wrath. This forfeiture accrues to the King, or to the lord of the manor, having this franchise, by grant from the King, or by prescription.

Deodands.
3 Inst. 57.
5 Rep. 110 b.
Hale P. C.
c. 32.
1 Salk. 220.

70. If the person wounded does not die within a year and a day, after receiving the wound, nothing will be forfeited; for the law does not look on such a wound as the cause of the person's death. But if the person dies within that time, the forfeiture shall have relation to the time when the wound was given: and cannot be saved by alienation, or other act whatever, in the meantime.

Hawk. P. C.
c. 67. § 7.

71. Nothing can be forfeited as a *deodand*, nor be seized as such, till found by the coroner's inquest to have caused the death of the person. But after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the vill where it fell; therefore the inquest ought to find its value.

Idem, § 8.

72. A hundred is a franchise consisting of a right to hold a hundred court or wapentake, which of common right belongs to the King. But a subject may have it by grant immemorial from the Crown; or by prescription in him and his ancestors.

A Hundred.
2 Roll. Ab. 73.
1 Vent. 403.
2 P. Wms.
399.

73. It was resolved, in a modern case, that the lord of a hundred, or wapentake, had not the power of granting a deputation to a gamekeeper, as a lord of a manor has.

Ailesbury v. Pattison,
Doug. 28.

74. Another franchise frequently annexed to a manor, is the right of holding a fair, or market, which is derived from the royal prerogative in the same manner as other franchises. But where the King grants a patent for holding a fair or market, it is usual

Fairs and Markets.

Rex v. Butler, 3 Lev. 222.
2 Vent. 344. to have a writ of *ad quod damnum* executed and returned: for though fairs and markets are a benefit to the public, yet too great a number of them may become a nuisance; and if the patent be found to be *ad damnum* of the neighbouring markets, it will be void.

1 Roll. Ab. 140.
Fitz. N. B. 184. note.
Yard v. Ford, 2 Saund. 172. 75. If a person levies a fair or market in a vill next to one in which a fair or market has been long held, to be on the same day, by which the ancient fair or market is impaired, it is a nuisance. And if a new market be erected without patent in a town, near one where there is an ancient market, it may be a nuisance, though holden on different days.

Holcroft v. Heel, 1 Bos. & Pul. 400.
Vide 2 Saund. R. 175a. note. 76. Where a grantee of a market, under letters patent from the Crown, suffered another to erect a market in his neighbourhood, and to use it for the space of 23 years, without interruption, it was adjudged, that such user operated as a bar to an action on the case for a disturbance of his market.

2 Inst. 220.
4 — c. 60. 77. Where the King grants a fair or market, the grantee shall have, without any words to that purpose, a court of record, called the Court of Piepowders, as incident thereto: because it is for the advancement and expedition of justice, and for the support and maintenance of the fair or market.

Idem, c. 61. 78. Owners and governors of fairs and markets are to take care that every thing be sold according to just weight and measure. For that and other purposes they may appoint a clerk of the fair or market, who is to mark and allow all such weights; and for his duty therein is entitled to just and reasonable fees.

2 Inst. 19. 79. A right of taking toll is usually annexed to a fair and market; though in many instances no toll is due; in which case it is called a free fair or market:

for toll is not of right incident to a fair or market, and can only be claimed by special grant from the Crown, or by prescription; and if the toll be unreasonable, the grant will be void.

Heddy v. Waterhouse, Cro. Eliz. 558.

80. By the statute of Westm. 1. c. 1., it is enacted, that where persons take outrageous toll, contrary to the common custom of the realm, in market towns, if they do so in a town belonging to the Crown, the King may seise the franchise into his own hands; and if it be in the town of a subject, and the same be done by the lord of the manor, the King shall do in like manner.

2 Inst. 219.

81. Where the King grants a fair generally, the grantee may hold it where he pleases, or rather where it can be most conveniently held; and if granted to be held in a town, he may hold it in any place in such town.

Dixon v. Robinson, 3 Mod. 107.

82. Queen Elizabeth granted by charter to Henry Curwen, lord of the vill and manor of Workington, that he and his heirs might hold, within the said vill, a market every Wednesday for ever. By another charter of the 2 Ja. II., reciting the former charter, and that the market thereby granted had not for many years been used, the King proceeded to grant, ratify, and confirm the same to Henry Curwen, Esq. and his heirs, in the same words, and in as ample a manner as before, *infra villam de Workington*.

Curwen v. Salkeld, 3 East, 588.

The question was, whether the lord of the manor had a right to remove the market-place from one situation to another, within the precincts of the vill of Workington.

Lord Ellenborough.—“ If the lord have a grant of a market within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another situation,

within the place named in his grant. This was long ago settled in *Dixon v. Robinson*; and in modern times has been acted upon in the case of Manchester market. There is nothing in reason to prevent the lord from changing the place, within the precinct of his grant; taking care at the same time to accommodate the public. Neither is there any authority which says, that having once fixed it, he is compellable ever after to keep it in the same place. In many instances there may be great public convenience in the owner having liberty to remove it, for the buildings in a growing town may take a different direction, away from the old market-place. If the lord, in the exercise of his right, be guilty of any abuse of the franchise, there may be a remedy of another nature. The right of removal, however, is incident to his grant, if he be not tied down to a particular spot, by the terms of it. Till it be removed, the public have a right to go to the place appointed, without being deemed trespassers; but after the lord has removed it, of which public notice was given in this case, the public have no longer a right to go there upon his soil. If a private injury has been sustained by any individual, who has been deceived, by the lord having holden out to him a particular site for the market-place, in order to induce him to purchase or build there, for the convenience of it; that may be the subject of an action to recover damages for the particular injury sustained by that individual; but does not preclude the lord's general right to remove the market."

How Franchises may be claimed.

1 Inst. 114 a.
9 Rep. 27 b.

83. The franchises which have been treated of in this title, are of two sorts: First, those which could have no existence till created by an actual grant; such as fairs, markets, a hundred, &c. As to these, a

claim to them must be supported by showing the grant thereof from the Crown, if within time of memory. But if before that period, then they must have the aid of some other matter of record, within time of memory, to make them available; as allowances thereof in Eyre, or some judgement of record in the King's courts, in support and affirmance thereof, or some confirmation by the Crown, by letters patent pleadable as a record.

Vide Tit. 31.
c. 1.

84. The other kind of franchises are those which were originally parcel of the royal prerogative, and do not owe their existence to a grant; such as free chase, park, and warren, &c. To these a title may be claimed from immemorial usage, without the aid of any record: for such usage induces a presumption of a royal grant, made before time of memory.

85. Franchises may be destroyed or lost by a re-union in the Crown; by surrender of the person entitled to them; by mis-user or by non-user. And where franchises are annexed to manors, they are not lost, though the court baron be lost.

How they
may be lost.

Dissert. c. 3.
§ 49.

86. It was laid down in the abbot of *Strata Marcella's* case, that when the King grants any franchises which are in his own hands, as parcel of the flowers of his Crown, within certain possessions; there, if they come again to the King, they become merged in the Crown, and he has them again *jure crownæ*: and if they were before appendant, the appendancy is extinct. But when franchises are erected and created by the King *de novo*; there, by the accession of them again, they are not merged. As if a fair, market, park, warren, &c. are appendant to manors, or in gross, and come back to the King, they remain as they were before, *in esse*, not merged in the Crown: for they were at first

Re-union in
the Crown.
9 Rep. 25 b.

created and newly erected by the King, and were not *in esse* before; and time and usage has made them appendant.

1 Inst. 121 b. 87. If A. be seised of a manor, whereunto the franchise of waif, estray, and such like, are appendant, and the King purchases the manor with the appurtenances; now are the royal franchises re-united to the Crown, and not appendant to the manor: but if he grant the manor in as large and ample a manner as A. had it, the franchises shall be appendant, or rather appurtenant, to the manor.

Surrender. 88. Franchises may also be destroyed by a surrender of them to the Crown, of which there are several instances.

Mis-user. 89. Where the object of a franchise is perverted, and there is either a mis-user or an abuser of it, the franchise is lost. And it is said by Lord Holt, that all franchises are granted on condition that they shall be duly executed, according to the grant. So that if the grantees of such franchises neglect to perform the terms, the patents may be repealed by writs of *scire facias*.

Bro. Ab.
Franchise,
pl. 14.

90. Where a person has a franchise to hold a market every week, on the Friday; and he holds it on the Friday and the Monday; in this case nothing shall be forfeited but that which he hath purprised. But he who has a fair to hold two days, and holds it three days, forfeits the whole. So where a man has a market to hold on the Saturday, and he holds it on another day, the market shall be forfeited, and he shall be fined for the misusing.

Idem, pl. 22. 91. If the King grants to a person a fair, for one day in the year, and the grantee holds a fair two days, and claims this upon process in the Exchequer, he shall forfeit his franchise. But if he claims one

day by the patent, and another by prescription, which is found false in the prescription, he shall not forfeit his patent.

92. If a person has several franchises, and the one does not depend on the other; there, if he misuses any, he shall not forfeit all, but only those which have been misused. But if one depends on the other, there, if he misuses one, all shall be seised and forfeited. Idem, pl. 14.

93. Non-user is also a cause of forfeiture of a franchise. Therefore, if a vill be incorporated by the King before time of memory, and the franchise never was used within time of memory, it is lost. Non-user.
Bro. Ab.
Franchise,
pl. 10. & 26.
Tit. 31. c. 1.

94. The franchise of holding a court leet will be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects; especially if often repeated and without excuse. 2 Hawk. P.C.
c. 11. § 5.

95. George Tottersall claimed, at the justice seat of the forest of Windsor, a court leet within his manor of F. The Attorney General desired that it might be inquired, 1. If he had used it. 2. If he had an able steward to discharge the office; for the want of that was also a cause of seisure. 3. If he had officers, and those things which are for the execution of justice, as constables, ale-tasters, &c., and pillory, stocks, and cucking stool, &c. 4. If he punished bakers more than three times, and did not set them in the pillory. All these were causes of seisure, till he paid a fine for the abuse, and replevied his franchise. Mr. Tottersall himself being called and asked concerning his court leet, confessed that he had not used it a great while, nor were there proper officers, or other things for the execution of justice; but he said it appeared by ancient rolls that there had been a leet there. Being asked to what leet his tenants went, he said they

Tottersall's
Case,
W. Jones,
283.

went to the sheriff's tourn, and paid head silver there. Upon which Mr. Attorney observed, that Mr. Totter-sall could have no leet, for all leets were drawn out of the sheriff's tourn, which was the leet in the King's hands, and head silver was *certum late*, and no man should be subject to two leets: therefore there could be no allowance of the leet, unless the King should be put out of that which (for aught he knew) he had ever had. So judgement was given against him for the leet.

Darell v.
Bridge,
1 Black. R.
46.

96. Upon a motion for an information in the nature of a *quo warranto*, against one Bridge, for holding a court leet, it appeared that in 14 Ja. I. the Crown granted to R. Miller, his heirs and assigns, the privilege of holding courts leet. No mesne conveyance appeared till 1702, when, and in 1708, 19, and 21, there were conveyances of the manor, with all courts thereunto belonging, to those under whom the defendant claimed. In the deed of conveyance to him in 1739, courts leet were expressly conveyed. In 1740 the defendant held a court leet, the first within the memory of any one living, though courts baron had been frequently held.

It was argued that the defendant could not deduce any title under the original grant; or if he could, yet that non-user was a disclaimer, and a forfeiture of such a franchise. On the other side it was contended, that the possession of the grant, together with the land, was an evidence of right; and that it would be of very pernicious consequence to grant these informations, whenever a lord could not deduce a title by mesne conveyances.

The Court said, that as there appeared no exercise of the grant till 1740, there was strong suspicion of some defect in the title: therefore it must go to be

tried by a jury. The rule for an information was made absolute.

97. Free chace and warren may, I presume, like other franchises, be lost by non-user, when claimed by prescription, or even by an express grant; as the non-user creates a presumption that the franchise had been surrendered. It is therefore necessary, where a claim of this kind is made, to prove a continued exercise of the right; though formerly it may have been held differently. Cro. Ja. 155.

TITLE XXVIII.

RENTS.

CHAP. I.

Of the Origin and Nature of Rents.

CHAP. II.

Of the Estate which may be had in a Rent, and its Incidents.

CHAP. III.

Of the Discharge and Apportionment of Rents.

CHAP. I.

Of the Origin and Nature of Rents.

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| 1. <i>Origin of Rents.</i> | 49. <i>At what Time payable.</i> |
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| 15. <i>Fee Farm Rents.</i> | 75. <i>Right of Entry by way of</i>
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SECTION 1.

Origin of
Rents.
Tit. 8, c. 1.
§ 2.

IT has been stated, that when the great lords enfranchised their villeins, they still employed them in the cultivation of their estates, which they granted either from year to year, or for a certain number of

years; reserving to themselves an annual return from the tenant, of corn or other provisions; hence the lands thus granted were called farms, from the Saxon word *feorm*, which signifies provisions.

2. This compensation or return for the use of the land thus let, acquired the name of *redditus*, rent. It is defined by Lord C. B. Gilbert, to be an annual Rents, 9. return made by the tenant, either in labour, money, or provisions, in retribution for the land that passes.

3. It follows that though rent must be a profit, yet there is no occasion that it should consist of money. For capons, spurs, horses, and other things of that nature, may be reserved by way of rent; it may also 1 Inst. 142 a. consist of services or manual labour, as to plough a certain number of acres of land, &c.

4. The profit reserved as rent must be certain, or Id. that which may be reduced to a certainty by either party. It must also be payable yearly, though it need not be reserved in every successive year, but will be good if reserved in every second or third year.

5. A rent must issue out of the thing granted, and Id. not be a part of the thing itself; for Lord Coke says, a man cannot reserve a part of the annual profits, as the vesture or herbage of land:

6. There are three kinds of rent; namely, rent Rent Service. service, rent charge, and rent seck. Where a tenant Lit. § 213. holds his land by fealty and certain rent, it is a rent service; this was the only kind of rent originally known to the common law. A right of distress was inseparably incident to it, as long as it was payable to the lord who was entitled to the fealty of the tenant. And it was called a rent service, because it was given as a compensation for the services to which the land was originally liable.

Tit. 2. c. 1.
§ 19, 20.

7. We have seen that in consequence of the statute *quia emptores*, if a person makes a feoffment in fee, or gift in tail, with a limitation over in fee, the feoffee or donee will hold of the superior lord, by the same services which the feoffor was bound to perform to him. It follows, that upon a conveyance of this kind, no rent service can be reserved to the feoffor or donor, because he has no reversion left in him; and as the feoffee or donee does not hold of him, he is not bound to do him fealty. But if upon a conveyance in tail, or for life, the donor keeps the reversion, and reserves to himself a rent, it will be a rent service; because fealty and a power of distress are incident to such reversion.

Lit. § 215.

Rent Charge. 8. Where a rent was granted out of lands by deed, the grantee had no power to distrain for it, because there was no fealty annexed to such a grant. To remedy this inconvenience, an express power of distress was inserted in the grant, in consequence of which it was called a rent charge, because the lands were charged with a distress.

1 Inst. 143 b.

9. Rent charges are of great antiquity, and were probably first granted for the purpose of providing for younger children. They were however considered as contrary to the policy of the common law; for the tenant was thereby less able to perform the military services to which he was bound by his tenure, and the grantee of a rent charge was under no feudal obligations; for which reason a rent charge was said to be against common right.

Tit. 11. c. 3.

10. A rent charge may now be created either by grant, or by the operation of the statute of uses. For it is enacted by that statute, § 4 & 5, that where divers persons stood and were seised of and in any

lands, &c. in fee simple or otherwise, to the use and intent that some other person or persons should have an annual rent out of the same; in every such case, the same persons, their heirs and assigns, that had such use and interest to have any such annual rents, should be adjudged to be in possession and seisin of the same rent, of and in such like estate as they had in the use of the said rent.

11. Lord Bacon, in his reading on this statute, observes, that in consequence of the words "were seised" a doubt had arisen whether the statute was not confined to rents in use at the time; but that this was explained in the following clause—"as if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent, to be had, made, or paid, according to the very trust and intent thereof."

Rivetts v. Godson,
Tit. 32, c. 10.

12. A rent granted for equality of partition between coparceners, is called a rent charge of common right; because the coparcener has given a valuable consideration for it. A rent granted in lieu of lands upon an exchange is of the same nature; as also a rent granted to a widow, out of lands of which she is dowable, in lieu of her dower.

Lit. § 252.
Gilb. 19.

13. A rent seck or barren rent is nothing more than a rent, for the recovery of which no power of distress is given, either by the rules of the common law, or the agreement of the parties.

Rent Seck.

14. Although every species of rent is comprised in the preceding divisions, yet there are some rents which are known by particular names.

Other Sorts
of Rents.

Rents of assize are the certain established rents of the freeholders, and ancient copyholders of manors.

2 Inst. 19.

Those of the freeholders are frequently called chief rents, *redditus capitales*; and both sorts are indifferently denominated quit rents, *quieti redditus*; because thereby the tenant goes quit and free of all other services.

Fee Farm
Rents.
2 Inst. 143 b.
n. 5.
2 Inst. 44.
Doug. R.
627. n.

15. A fee farm rent is a perpetual rent reserved on a conveyance in fee simple. And Lord Coke says, if a rent be to the whole value of the land, or to the fourth part of its value, it is called a fee farm. Mr. Hargrave has observed on this passage, that the true meaning of a fee farm is a perpetual farm or rent; the name being founded on the perpetuity of the rent or service, not on the *quantum*: that the sometimes confining the term fee farm to rents of a certain value, probably arose, partly from the statute of Gloucester, which gives the *cessavit* only where the rent amounts to one fourth of the value of the land; and partly from its being most usual, on grants in fee farm, not to reserve less than a third or fourth of such value.

Bradbury v.
Wright,
Doug. R.
624.

16. After the statute *quia emptores*, granting in fee farm, except by the King, became impracticable; because the grantor parting with the fee, is, by the operation of that statute, without any reversion; and without a reversion, there cannot be a rent service. A perpetual rent may however be reserved on a conveyance of lands in fee simple; and if a power of distress and entry is given to the grantor of the land, his heirs and assigns, the rent will be good as a rent charge, but not as a fee farm rent.

What gives
Seisin of a
Rent.
Tit. 5. c. 1.
§ 12.

17. With respect to the mode of acquiring seisin of a rent; in the case of a rent service, the person entitled cannot acquire a seisin in deed before the rent becomes due; for nothing but the actual receipt of it will have that effect.

As to a rent charge, the only mode of acquiring a seisin in deed of it, when created by grant, is by the actual receipt of the whole or of a part of it. And formerly it was usual, where a freehold estate in a rent charge was created, to pay the grantee a penny in the name of seisin of the rent: but where a rent is created by means of a conveyance to uses, the grantee immediately acquires a seisin, by the words of the statute.

18. A rent must in general issue out of lands, or out of tenements of a corporeal nature, whereto the grantee may have recourse to distrain. A rent could not therefore be formerly reserved out of an advowson in gross, tithes, or other incorporeal hereditaments: because, as Lord C. B. Gilbert says, every incorporeal right, till by age it was formed into a prescription, did originally rise by grant from the Crown; and such grants seem to have been made for particular purposes; as the grant of a fair, to be under the protection of the lord; the grant of a common for the benefit of the beasts of all the tenants: therefore, to let such incorporeal inheritances for rent, was esteemed contrary to the design and purpose of such grants.

Out of what
a Rent may
be reserved.
1 Inst. 47 a.
142 a.
Gilb. 20. 22.

19. A rent cannot be reserved out of a rent; therefore, if a person grants lands in tail rendering rent, and after grants the rent for life, or in tail, rendering rent, this is a void reservation; because it passes as a rent seck. And if A. has a rent service, or rent charge, and grants it to another for term of life, by deed indented, rendering to A. certain rent; the reservation is void; because rent cannot be charged with other rent; for it cannot be put in view.

2 Roll. Ab.
446.

Keilw. 161.

20. By the stat. 5 Geo. III. c. 17. it is enacted, that leases made by ecclesiastical persons, of tithes or other incorporeal hereditaments, shall be good: and that the rents reserved in such leases may be recovered by action of debt.

1 Inst. 47 a.

21. Where a lease is made of the vesture or herbage of land, a rent may be reserved; because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.

Idem.

22. A rent may be reserved upon a grant of an estate in remainder or reversion: for though the grantee cannot distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession.

2 Roll. Ab.
446.

23. Where a person grants a future interest in lands, as a lease for years, to commence *in futuro*, he may reserve a rent immediately: for it will be a good contract to oblige the lessee, and to ground an action of debt; and the lessor may have his remedy by distress for the arrears, when the lessee comes into possession.

Windsor
v. Gover,
2 Saund. 302.

24. It should be observed, that if a lease be made of an incorporeal hereditament, reserving rent, such reservation is good to bind the lessee, by way of contract; for the nonperformance of which the lessor shall have an action of debt: because if the lessee undertake to pay an annual sum by his deed, such undertaking gives the lessor a right to it; and the law in all cases gives remedies adequate and correspondent to every man's right.

1 Inst. 47 a.

25. A rent may be reserved to the King out of an incorporeal hereditament; because, by his prerogative, he may distrain for such rent on all the lands of his

lessee. And as he has a remedy, there is therefore no reason that such a reservation should be void.

26. With respect to the conveyances upon which a rent can be reserved, it may be laid down as a general rule, that upon every conveyance which passes an estate, or enlarges an estate, a rent may be reserved; for rent being a return for something given, it follows, that wherever an estate passes, there may be a return.

Upon what Conveyances, and how.
1 Inst. 144 a.
Gilb. 22.

27. Rents are most usually reserved on leases: but a rent may also be reserved on a release, a bargain and sale, covenant to stand seised, and lease and release.

Vide Tit. 32.
c. 9, 10, 11.

28. There may be several reservations of several rents, in the same conveyance. As where a lease was made of three manors, reserving for one a rent of 6*l.*, for another a rent of 5*l.*, and for the third a rent of 10*l.*, with a condition of re-entry into the whole, for nonpayment of any part; it was held that these several reservations of rent created several tenures, demises, reversions, and rents.

Winter's Case, 2 Roll. Ab. 448.

29. A tenant in tail of C. leased the site and demesnes of the manor, together with the manor itself, and all lands to the same belonging, for 21 years, rendering for the site therewith letten 6*l.* 6*s.* 8*d.*, and rendering for the said manor and premises therewith letten 9*l.* 10*s.* It was resolved that these were several reservations.

Tanfield v. Rogers, Cro. Eliz. 340.

30. A lease was made of three manors, viz. D., E., and F., reserving for D. 5*l.*, for E. 10*l.*, and for F. 10*l.*, upon condition that if the said rents, or any of them, or any part thereof, were behind, the lessor might re-enter into all. The lessor sold the reversion of one of the manors to W. and afterwards sold him the reversion of the other two manors. The rent

Lee v. Arnold, 4 Leon. 27.

being in arrear for one manor, the purchaser entered into all three. Adjudged, that his entry was not lawful; for though the words were joint, yet the reservation and the rents were several.

Hill's Case,
4 Leon. 187.

ante, § 28.

31. A., seised of White Acre, Black Acre, and Green Acre, leased all three to J. S. for 90 years, rendering for Black Acre 3*s.* 4*d.*, for White Acre 10*s.*, and for Green Acre 20*s.*, quarterly; with a clause of re-entry, if any part or parcel of the said rent should be behind, &c. W. R. purchased the reversion of Black Acre, brought an ejectment for 10*s.*, being a quarter's rent, and had judgement; these being several reservations and conditions. A difference was taken between this and Winter's case, the rent in that being originally entire, whereas here it was originally several; and in that case the condition was, that if any part of the rent was behind, the lessor should re-enter into the whole.

32. But where there is one reservation of rent in gross, at first; though it be afterwards divided and severed into different parts, yet it will be one entire rent.

Knight's
Case, 5 Rep.
54.

33. The prior of St. John made a lease of divers houses for years, yielding the yearly rent of 5*l.* 10*s.* 11*d.*; viz. for one house 3*l.* 0*s.* 11*d.*, for another 20*s.*, and for the other houses several rents, residue of the said rent; with a condition, that if the said rent of 5*l.* 10*s.* 11*d.* was behind in part, or in all, then the prior and his successors should re-enter. Resolved, that this was one reservation of the rent in gross, at the first; and the viz. afterwards did not make a severance of it, but was rather a several declaration of the several values of each parcel; by which it appeared how, and at what rates, the whole rent was reserved.

34. In the above case, Roodes, Justice, said, if two tenants in common make a lease upon condition, rendering rent; the law will construe the demise, the condition, and the rent, to be several; because the tenants in common have several reversions.

35. With respect to the persons to whom a rent may be reserved, Littleton lays it down as a certain rule, that no rent service can be reserved, upon any feoffment, gift, or lease, to any person but the feoffor, donor, or lessor, or to their heirs; and in no manner to a stranger. The reason of this rule is, because the rent being payable as a return for the possession of the land, can only be reserved to the person from whom the land passes.

To what
Persons.
Lit. § 346.
1 Inst. 47 a.
143 b.

36. As there can be no reservation of rent service to a stranger during the life of the lessor; neither can a rent service be reserved after the death of the lessor, to any person but the reversioner: for to him the land would belong, if it were not demised.

Gilb. Rents,
61.

37. If a person makes a lease, to commence after his death, reserving rent to his heirs; this will be deemed a good rent service, arising to the heir, not by way of purchase, but as incident to the reversion, descending to the heir; and therefore may be released by the ancestor, during his life; which it would not be if it was a new purchase in the heir.

2 Roll. Ab.
447.
2 Saund. 370.

38. But where a father and his son and heir apparent demised lands for years, to begin after the death of the father, rendering rent to the son; the father died, the lessee entered, and the rent being behind, the son distrained. Resolved, that this reservation of rent was utterly void; for although the son did prove heir, it bettered not the case by the event: but the reservation should have been to the heir or heirs of the lessor, by that name; for that

Oates v.
Frith,
Hob. 130.

was the only word of privity in law requisite in the reservation of rents; the heir being *eadem persona cum antecessore*.

1 Inst. 47 a. 39. Where a rent is reserved generally, without specifying to whom it shall be paid, it will go to the lessor; and after his death, to the person who would have inherited the land, if no such lease had been made. If the reservation be to the lessor and his heirs, the effect will be the same; provided the lessor is seised in fee.

Cother v.
Merrick,
Hard. 89.

40. A tenant in special tail leased for years, reserving a rent to himself, his heirs and assigns; the question was, to whom it should go, after the death of the lessor; the estate having descended to a person who was not heir at law to the lessor. Lord Ch. B. Widdrington laid down the following points: 1. Where no person in particular is named to receive the rent, it shall go to the heir, together with the reversion; but where the lessor particularizes the persons, there the law will carry it further, for the agreement of the parties prevents the construction of law. 2. Where the reservation is special, and to improper persons, there the law follows the words. 3. Where the words are general, they will be expounded according to law. Resolved, that the rent should go with the reversion to the special heir in tail, though it was reserved to the heirs generally; for the word *heir* should be taken in that sense which would best answer the nature of the contract; which was, that those who would have succeeded to the estate, if the lease had not been made, should enjoy the rent.

1 Inst. 47 a.
Wootton
v. Edwin,
12 Rep. 36.

41. If a rent be reserved to the lessor and his assigns, it will determine at his death; for the reservation is good only during his life. So if a rent is reserved to him and his executors, he having the free-

hold, it will determine at his death; because the reversion, to which the rent is incident, descends to the heir. But if a lease be made of a term for years, 1 Vent. 161. reserving rent to the lessor and his heirs, it will determine by the death of the lessor; for the heir cannot have it, as he cannot succeed to the estate, being only a chattel; and the executor cannot have it, there being no words to carry it to him.

42. Where a rent was reserved to the lessor, his executors, administrators, and assigns, yearly, *during the term*, it was resolved, that it should go to the heir of the lessor; for although there was no mention of the heirs in the reservation, yet there were words which evidently declared the intention of the lessor, that the payment of the rent should be of equal duration with the lease; the lessor having expressly provided that it should be paid during the term; consequently the rent must be carried over to the heir, who came into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made. And if the lessor had assigned over his reversion, the assignee would have the rent as incident to it; because the rent was to continue during the term, and must therefore follow the reversion, since the lessor made no particular disposition of it, separate from the reversion.

Sacheverell
v. Frogate,
2 Saund. 367.

43. Where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them, and not to the heir.

44. A tenant for three lives, to him and his heirs, assigned over his whole estate, reserving to himself, Jenison v. Lexington,
1 P. Wms. 555. his executors, administrators, and assigns, a rent of

10l., with a proviso, that upon non-payment the

assignor and his heirs might re-enter; and the assignee covenanted to pay the rent to the assignor, his executors and administrators. The question was, whether this rent should go to the heir or executor of the assignor. It was decreed by Sir J. Jekyll, that the rent should go to the executor; as it was reserved to him, and there was no reversion left in the assignor, to which the rent was incident, so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executors and administrators of the assignor, was good and binding, both in law and equity. And though the proviso was, that in case of non-payment of the rent, the assignor and his heirs might re-enter, yet the Court thought this immaterial; as in equity the heir must, in this case, be looked upon as a trustee for the executor.

This case came on again before Lord King, who was of opinion, that there being no reversion, the rent might be well reserved to the executors, during the three lives; and decreed accordingly.

1 Inst. 214 a.
n. 1.

45. Lord Coke says, if tenant for life and the person in reversion join in a lease for life, or gift in tail, by deed, reserving a rent, this shall enure to the tenant for life, only during his life, and after his death to the person in reversion.

1 Rep. 139 a.

46. It is said, in Chudleigh's case, that if a feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the tenant for life to make leases, so that he reserve the best accustomed rent, payable to all those who would have the reversion; if tenant for life makes leases pursuant to his power, the lessees derive their interest out of the first feoffment. How then can the reservation of the rent be good; and how could his heir, or he in remainder, come at it?

This doubt appears to be removed by the following determinations.

47. Thomas Lovet levied a fine, to the use of himself for life, after his decease to his executors for 12 years, remainder to his first and other sons in tail, remainder over, with a power to T. Lovet to make leases, not exceeding 99 years. T. Lovet made a lease for 60 years, rendering annually to himself, during the term, and after his decease, to such person and persons to whom the reversion or remainder of the premises should, from time to time, belong, by the said limitation of uses, the sum of 3*l*. It was agreed by the Court, that the lease was good enough, and that the rent was distrainable by those in remainder, as they happened to be immediate to the lease.

Harcourt
v. Pole,
1 And. 173.

48. W. Whitlock, being tenant for life, under a declaration of uses of a fine, remainder to his son in tail, remainder over, with a power of leasing, demised the premises, reserving rent to himself, his heirs and assigns, and to such other person or persons as should be entitled to the inheritance of the said premises after his decease. It was objected, that this reservation was void ; as rent could only be reserved to the lessor, donor, or feoffor, and their heirs, and not to persons only privies in estate, as remainder-men and reversioners. But it was resolved that the reservation was good : that if a reservation had been to the lessor, and to every person to whom the inheritance or reversion of the premises should appertain during the term, it would have been good ; for the law would distribute it to every one to whom any limitation of the use should be made. And it was agreed, that the most clear and sure way was to reserve the rent yearly during the term, and leave the law to make

Whitlock's
Case,
8 Rep. 69.

the distribution, without an express reservation to any person.

At what
Time pay-
able.

49. With respect to the time when rents are payable, it is either by the particular appointment of the parties in the deed, or else by appointment of law. But the law never controls the express appointment of the parties, where such appointment will answer their intention.

Lat. 264.
3 Bulst. 329.

50. Where rent is reserved generally, it is payable at the end of the year ; but if it be reserved *annuatim durante termino prædicto*, the first payment to begin two years after, this will control the words of reservation.

Harrington
v. Wise,
2 Roll. Ab.
450.

51. If a rent be made payable at the two most usual feasts, without specifying them, the law will construe this to mean Michaelmas and Lady-day ; because those are the days usually appointed in contracts of this nature for such payments.

Id. 449,

52. If a lease be made for years, provided the lessee shall pay 10*l.* at Michaelmas and Lady-day, by even portions, during the term, though the word annually be omitted, yet the law will construe it to be so ; because it is made payable during the term.

Id. 450.

53. If a lease be made on the first of May, or at any other time, reserving rent, payable quarterly, this shall be intended quarterly from the date of the lease, and not at the usual feasts.

Idem.

54. If a lease be made, reserving rent at the two usual feasts, without saying by equal portions, the rent shall, notwithstanding, be paid by equal portions.

Clun's Case,
10 Rep. 127.

55. A lease was made for 20 years, reserving rent during the term, payable at Michaelmas and Lady-day, or within 13 weeks after every of the said feasts. Resolved, that the rent was not payable till

the end of the 13 weeks; the disjunctive being evidently added for the benefit of the lessee.

56. In a subsequent case, a tenant for life made a lease for 21 years, rendering rent at Michaelmas and Lady-day, or within 13 weeks of any of the said feasts. After Michaelmas, before the 13 weeks past, the tenant for life died, and his executors brought an action of debt for the rent. It was adjudged that the action did not lie; for the rent being to be paid at Michaelmas or 13 weeks after, the lessee had his election to pay it at any of the days, and before the last day it was not due. If the rent had been reserved at Michaelmas, and if it was behind for 13 weeks, then that it should be lawful for the lessor to re-enter: the rent would have been due at Michaelmas, the 13 weeks being but a dispensation of the entry.

Glover v. Archer,
4 Leon. 247.

57. Where a lease ends at Michaelmas, and the rent is payable on that day, or within 10 days after, the last payment is due at Michaelmas, without any regard to the 10 days; the rent being due for the last year, though the year expired before the 10 days. For the reservation being annually during the term, at the said feasts, or within 10 days, it should be expounded, according to the contract, at the end of every 10 days during the contract; but the term ending at Michaelmas, so as there could not be 10 days after, the law will reject the 10 days after the last feast, for that cannot be; and then it was due at the feast, according to the contract of the parties.

Barwick v. Foster,
Cro. Ja. 233.
310.

58. A lease was made of tithes, from February 1661 to Michaelmas 1668, reserving rent at Lady-day and Michaelmas, or within twenty days after each feast, during the term. An action was brought for the rent which became due at Michaelmas 1668; to

Biggin v. Bridge,
3 Leon. 211.
3 Keb. 534.

which the defendant demurred, because the last Michaelmas day was not within the term. Held by Twisden, that in contracts the intent is sufficient, and that Michaelmas-day must here be taken to be inclusive.

When it goes
to the Execu-
tor, and when
to the Heir.

59. The right to a rent service is a real estate, descendible to the person entitled to the reversion of the lands out of which it issues. But from the moment that a payment of rent becomes due, it is then personal estate: therefore where the person entitled to a rent service outlives the day on which it becomes due, it will go to his executor or administrator; but if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion.

1 Saund. 287.
n. 11.

60. Although rent must be demanded at sunset of the day on which it is payable, if the lessor intends to take advantage of a condition; yet rent is not due till the last minute of the natural day. In the case of leases made by tenants in fee, or under a power, if the lessor dies on the day of payment, but before midnight, the rent will go along with the land to the heir, or the person in remainder or reversion; because the lessee has till the last instant to pay his rent: consequently the lessor dying before it was completely due, his personal representatives can make no title to it.

61. But where a lease is made by a bare tenant for life, which determines at his death, there, if the person entitled to the rent lives to the beginning of the day on which it is payable, it will vest in his representative.

Southern v
Bellasis,
cited
1 P. Wms.
179.

62. A term of 500 years was created for securing a rent charge of 200*l.* a year to Lady Cole for her life. Lady Cole died on Michaelmas-day, on which

day the rent was payable, at nine o'clock at night. The question was, whether the term was void without payment of this quarter's rent; or whether this quarter's rent remained due to Lady Cole, so as to entitle her administrator thereto.

Mr. Justice Tracy was of opinion that the rent was due, when by law it ought to be paid; therefore since Lady Cole lived beyond sunset, which was the time when the money was demandable, and to be paid by the tenant upon pain of forfeiting his lease, he thought the money was due to her, and ought to be paid to her administrator.

63. Sir Henry Johnson was tenant for life, with remainder to Lady Wentworth. Sir H. Johnson made leases for years, reserving the rent at Lady-day and Michaelmas, and died on Michaelmas day about 12 o'clock at noon. The question was, whether these rents belonged to the executor of Sir Henry Johnson or to Lady Wentworth; or whether the tenants should retain them.

Lord Macclesfield decreed, that as to those leases which determined on the death of Sir H. Johnson, the rents belonged to his executors; because, though for the benefit of the tenants, they had till the last instant of Michaelmas-day to pay the rents, yet the reservation being on Michaelmas-day, as soon as that day began they were at their peril to take care that they were paid accordingly. But as to the leases made by virtue of a power, they still had existence; therefore the tenants had till the last instant of the day to pay the rent: then, when the lessor died before, the rent went along with the reversion, to the person who was entitled to it.

Strafford v.
Wentworth,
1 P. Wms.
180.
Prec. in Cha.
555.

Rockingham
v. Penrice,
1 P. Wms.
178.

64. Sir James Oxenden, before marriage, settled an estate on his lady, the plaintiff, for her life, with a power to himself to make leases. Sir J. O. made leases pursuant to his power, reserving the rent at Lady-day and Michaelmas; and died upon Michaelmas-day, between three and four o'clock in the afternoon, before sunset. One of the lessees paid his rent to Sir James Oxenden in the morning of the said Michaelmas-day; but the other tenants had not paid their rents. The question was, whether the rents which were not paid belonged to the executors of Sir J. Oxenden, or to the jointress.

It was decreed by Sir John Trevor, M. R., that the lessor dying before sunset, and there being no remedy for the lessor to recover these rents during his life, they should go to the jointress; and that the executors of Sir J. O. should also pay the rent which he received on the day of his death, to the jointress. But as to this last point there is a *query* by the reporter.

sh. 3.

65. Rent service is now sometimes apportioned between the executor of a tenant for life, and the remainder man; of which an account will be given hereafter.

66. A rent charge of inheritance is also a real estate, descendible to the heir. But from the moment that a payment of it becomes due, it is personal estate, and will go to the executor or administrator.

Remedies for
Recovery of
Rents.

67. With respect to the remedies for the recovery of rents, there are several sorts, of which some are derived from the common law, some from particular statutes, and some from the express agreement of the parties.

68. Where a rent service was in arrear, the common law gave to the person in reversion a right to enter on the lands, to seize the cattle and other personal chattels found there, and to sell them for payment of the rent ; which is called a distress.

69. If a person holds land of the King, and his rent is in arrear, the King may distress in his other lands and tenements. But this must be understood in such other lands as his tenant has in his own actual possession, and manured with his own beasts ; and not in the possession of his lessee for life, years, or at will ; for their beasts are not subject to such distress.

70. By several statutes the remedy by distress is extended to the proprietors of what were formerly called rents seck, and also to rent charges ; and to the executors or administrators of the proprietors of such rents, even after the determination of the leases upon which such rents were reserved.

71. It was formerly usual, where a feoffment was made, reserving rent, to insert a condition in the deed, that if the rent was behind, it should be lawful for the feoffor or his heirs to re-enter, and hold the lands till he was satisfied for the rent in arrear. This was held not to be a condition absolutely to defeat the estate ; but the feoffor, on his entry, should hold the land as a pledge, till he was paid the rent. And the profits should not go in discharge of the rent, but should be applied to his own use.

Lord Coke however observes that if the words of the condition were, that the feoffor should re-enter and take the profits, till thereof he was satisfied ; there the profits should be accounted as part of the satisfaction.

72. The distinction when the profits taken by the lessor after entry are, and when they are not to be, in

Distress.

2 Inst. 132.
4 — 119.
Bro. Ab.
Prer. pl. 68.
Att. Gen. v.
Coventry.
1 P. Wms.
306.

27 Hen. VIII.
c. 10.
32 — c. 37.
8 Ann. c. 14.
4 Geo. II.
c. 28.

Clause of
Re-entry.
Lit. § 327.

1 Inst. 203 a.

Idem, n. 3.

satisfaction of the rent, is not admitted in equity. For the Court of Chancery will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession: and will compel him, after he has satisfied the rent in arrear, and the costs attending his entry, and detention of the lands, to give up the possession to the lessee, and to pay him the surplus profits of the estate.

Jemmott
v. Cowley,
1 Lev. 170.
T. Raym.
135. 158.

73. In grants of rent charges, a clause of entry on the lands out of which the rent charge is granted, is usually inserted; in consequence of which an interest vests in the grantee, whenever the rent charge is in arrear; which he may reduce into possession by an ejectment. But the possession thus acquired is only till the grantee of the rent charge is satisfied his arrears, out of the rents and profits of the land.

Gilb. 73.

74. In case of a distress, no demand of the rent is necessary; but where the remedy for the recovery of rent is by way of entry, there must be an actual demand made, previous to the entry, otherwise it is tortious; because a condition or power of entry is in derogation of the grant, and the estate at law being once defeated, it is not to be restored by any subsequent payment. It is therefore presumed that the tenant is residing on the premises, in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it. So that unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land, ready to pay the rent; the law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear, unless a demand is actually made on the land.

75. In the creation of rent charges, a right of entry is now usually given by the operation of the statute of uses. As if lands are conveyed to A., to the use, intent, and purpose that B. may receive out of the lands so conveyed a certain annual sum or yearly rent charge; and to this further use, intent, and purpose, that if such rent charge be in arrear for a certain time, it shall be lawful for B. and his assigns to enter upon and hold the land, and receive the profits thereof, till the arrears of the rent charge are satisfied. Here, as soon as the rent is in arrear, a use, derived out of the seisin of the trustee or releasee to uses springs up, and vests in the person to whom the power of entry is given, which is immediately transferred into possession, by the operation of the statute 27 Hen. VIII.: he has consequently a right to take and keep that possession, till the purpose for which it is executed is satisfied; when the use determines. By virtue of this estate he may make a lease for years to try his title in ejectment, either to obtain possession of the lands, if it be withheld from him, or to restore it, if it be disturbed or divested; and if he assigns over the rent charge, this right of entry and perception of the rents and profits of the lands, charged with the payment of it, will pass to the assignee.

Right of Entry by way of Use.
Gilb. 137.
Haverhill v. Hare,
Cro. Ja. 510.

Tit. 11. c. 3.
§ 40.

76. By the statute 4 Geo. II. c. 28. § 2. it is enacted, that every landlord, who by his lease has a right of re-entry in case of nonpayment, when half a year's rent is due, and no sufficient distress is to be found, may serve a declaration in ejectment on his tenant, and affix the same on some notorious part of the premises; which shall be valid without any formal re-entry, or previous demand of rent: and that a recovery in such ejectment shall be final and conclusive,

Ejectment.
1 Saund. R.
287. n.

1 Burr. 620.
7 Term R.
117.

both in law and equity; unless the rent and all costs be paid within six calendar months after.

1 Inst. 202 a.
n. 3.

77. By the fourth section of this statute it is provided, that if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs; or pays such arrears and costs into Court, the proceedings in ejectment shall cease and be discontinued.

Actions of
Debt and
Covenant.

78. In most cases, an action of debt may now be brought for rent. And in all modern leases, wherein rent is reserved, a covenant is inserted, on the part of the lessee, to pay the rent; on which an action of covenant may be brought.

Courts of
Equity.
Treat. of Eq.
B. 1. c. 3.
§ 3.

79. As it is a maxim of equity that a right shall not be without a remedy, the Court of Chancery will, in some cases, give its assistance to persons entitled to rent: but equity will not afford a remedy for rent, when there is one at law; nor change the nature of the rent, so as to make the person liable, unless there is fraud in preventing a distress.

Bridges v.
Edwards,
6 Bro. Parl.
Ca. 368.

80. Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, the Court of Chancery has exercised a jurisdiction; and has constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents; and payment thereof for the future.

TITLE XXVIII.

RENTS.

CHAP. II.

Of the Estate which may be had in a Rent, and its Incidents.

- | | |
|---|---|
| 1. <i>An Estate in Fee.</i> | 21. <i>Or to commence in futuro.</i> |
| 2. <i>An Estate Tail.</i> | 23. <i>Or to cease for a Time only.</i> |
| 3. <i>An Estate for Life or Years.</i> | 24. <i>Are within the Statute of</i> |
| 4. <i>Occupancy of a Rent.</i> | <i>Uses.</i> |
| 10. <i>Subject to Curtesy.</i> | 28. <i>Cannot be devested.</i> |
| 13. <i>And to Dower.</i> | 31. <i>How forfeited.</i> |
| 16. <i>May be granted in Re-
mainder.</i> | |

SECTION 1.

WITH respect to the estate which may be had in a rent, a person may be tenant in fee simple of a rent service created before the statute of *quia emptores*. And a rent charge may now be limited to a person in fee simple.

2. A rent charge being an incorporeal hereditament, issuing out of lands, is comprehended within the statute *de donis conditionalibus*, and may therefore be entailed. There is, however, a very material distinction between a rent limited to a person and the heirs of his body, and an estate in land limited in the same manner; of which an account will be given in a subsequent title.

3. A rent charge may be limited to a person for his own life, or for that of any other, or for any

An Estate
in Fee.

An Estate
Tail.

Tit. 2. c. 1.

Tit. 36. c. 7.

An Estate for
Life or Years.

number of lives: in which case the grantee will be tenant for life, or *pour auter vie*, of such rent. A rent charge may also be limited to a person for any number of years.

Occupancy
of a Rent.
Salter v.
Boteler,
Vaugh. 199.
1 Salk. 189.

4. By the common law there could be no general occupant of a rent: thus where a rent was granted to A. during the life of B., and A. died, living B., the rent determined. For the grant being originally made to A. only; when he died, no one could claim it as occupant, because there could be no entry upon it: nor could any one claim it under the deed, because no one was party to it, but the grantee. It followed therefore, that as no one could take it under the grant, it ceased and determined.

1 Inst. 388 a.
Vaugh. 201.

5. There might however be a special occupant of a rent; as if a rent was granted to A. and his heirs, during the life of B., and A. died, living B., the heir of A. would be special occupant of the rent.

Bowles v.
Poore, Cre.
Ja. 282.

6. A person granted a rent charge to W. R. to him and his heirs, during his life, and the lives of M. his wife, and D. and M. his daughters. It was contended that this rent, being granted to one and his heirs, during his life and that of three other persons, was not descendible to the heir, nor should the heir be occupant thereof. But all the Court held these limitations to be good enough; and that the heir should have this rent, as a party specially nominated, and as heir by descent; though it was not properly an estate descendible.

Buller v.
Cheverton,
2 Roll. Ab.
152.

7. It is said to have been formerly held, that if a man granted a rent to A., his executors, administrators, and assigns, during the life of B., the executor of the grantee should not be a special occupant, because it was a freehold, which could not descend to an executor.

Mr. Cox, in his valuable notes on Peere Williams, 3 P. Wms. 264. has observed, that there seems to have been no sound reason for this distinction; and it appears to be now settled, that a freehold estate may become vested in executors, as special occupants. Tit. 3. c. 1. § 55.

8. In consequence of the statute of frauds, 29 Cha. II. Idem, § 49. c. 3. § 12. an estate *pour auter vie* in a rent is now devisable; if not devised, it is assets by the statute 14 Geo. II. c. 20. in the hands of the heir, if he takes it as special occupant. Where there is no special occupant, it will vest in the executors or administrators of those who died possessed of it, and shall be assets in their hands.

9. It is also said by Mr. Cox to have been laid down by Lord Harcourt, that if, since the statute of frauds, a rent be granted to A. for the life of B., and A. die, living B., A.'s executors or administrators shall have it during the life of B. For the statute was not only made to prevent the inconvenience of scrambling for estates, and getting the first possession, after the death of the grantee; but likewise for preserving and continuing the estate during the life of the *cestui que vie*. That though by his dying without having made any such disposition, in nicety of law, the estate would have determined; yet by the statute, that interest which passed from the grantor ought to be preserved, and should go to the executors or administrators of the grantee, during the life of the *cestui que vie*; and the statute in this case did not enlarge, but only preserve the estate of the grantee. 3 P. Wms. 264. n. D. 7 Ves. 448.

10. A person may be tenant by the curtesy of a rent service, where he is entitled to the reversion; as also of a rent charge: and a seisin in law will be sufficient for that purpose; because in many cases it may be impossible to acquire any other seisin. Subject to Curtesy. Tit. 5. c. 1. § 11. 1 Inst. 29 a.

Dethick v.
Bradburn,
1 Sid. 110.
117.

11. A rent charge was granted to a woman and her heirs, payable at two feasts in the year, the first payment to be made at such of the said feasts as should happen after the death of J. S. The woman married, had issue, and died. The question was, whether the husband should be tenant by the curtesy of this rent. No judgement appears to have been given: but Glynn, C. Just. thought the husband was entitled to curtesy; for though the rent was to commence *in futuro*, yet it was granted over presently, which proved it to be in *esse*; so that the wife might be said *habere hæreditatem*; and the seisin was not material, it being the case of a rent.

1 Inst. 30 a.
vide Tit. 5.
c. 2. § 9.

12. It is said by Lord Coke, that if a woman make a gift in tail, reserving a rent to her and her heirs, and the donor taketh husband, and hath issue, and the donee dieth without issue; the wife dieth; the husband shall not be tenant by the curtesy of the rent; for that the rent newly reserved was determined by the act of God, and no state thereof remained. But if a man be seised in fee of a rent, and maketh a gift in tail general to a woman; she taketh husband, and hath issue; the issue dieth; the wife dieth without issue; he shall be tenant by the curtesy of the rent, because it remaineth.

And to
Dower.
1 Inst. 32 a.

13. A rent service is subject to dower; so that if a husband makes a lease for years, reserving rent, marries, and dies; his wife shall be endowed of the third part of the reversion, together with the third part of the rent. So if a man makes a gift in tail, reserving rent to him and his heirs, and after marries and dies, his wife shall be endowed of this rent, because it is a rent in fee, and by possibility may continue for ever.

14. A rent charge in fee or in tail is also subject to dower; but an annuity, which is only a personal inheritance, is not. If a rent charge be granted to a man and his heirs, who dies, and his widow brings a writ of dower against the heir, and he answers that he claims the same as an annuity, and not as a rent charge; yet the widow shall recover dower out of it; for the heir cannot determine his election by claim, but by suing a writ of annuity.

1 Inst. 32 a.
Id. 144 b.

15. Where a rent *de novo* is granted to a man and the heirs of his body, and the grantee dies without issue, his widow shall not be endowed of it: for the rent being determined by the death of the husband without issue, the widow cannot be endowed of that which is not in being. Though it is otherwise where a tenant in tail of lands marries, and dies without issue, whereby the estate tail is determined, for in that case it has been shown that the wife shall be endowed.

Chaplin v.
Chaplin,
3 P. Wms.
229.

Tit. 6. c. 3.
§ 5.

16. It is however said by Lord Talbot, in the above case, that if a rent in *esse* be granted to A. in tail, remainder to B. in fee, and A. marries and dies without issue, his wife shall be endowed: or if a rent *de novo* be granted to A. in tail, remainder to B. in fee, and A. marries and dies without issue, his wife shall be endowed. For the estate tail in the rent shall be allowed to continue, as against the remainderman:

17. A woman will not however be entitled to dower of a rent charge, unless her husband had the legal estate in it.

Chaplin v.
Chaplin,
infra.

18. A rent charge may be granted in remainder after a limitation of it to a person for life; and if a rent charge were granted to A. for the life of B., re-

May be
granted in
Remainder.

Salter v. Butler, Yelv. 9. remainder over; though A. should die in the lifetime of B., so that the particular estate determined in interest, as to the perception of the profits; yet inasmuch as the terretenant during the time held the land discharged, it was sufficient to support the remainder.

Cont. Rem. 452.

ante, § 8.

19. Mr. Fearne doubted whether this holding of the land discharged would have supported a contingent remainder; but has said, that at this day there could be no room for a question of this nature; for since the statute 29 Cha. II. and 14 Geo. II. c. 20. the rent charge is holden to continue in the personal representatives of the grantee, dying in the lifetime of the *cestui que vie*.

Wicks v. Peach, Salk. 557.

20. A grant of a rent charge to A. and the heirs of his body, remainder to B. and his heirs, has been held to be good. For though it was objected that there could be no remainder of that whereof there was no reversion; yet it was held by Lord Holt that there may be a remainder of a rent *de novo*; for the intent of the party gives it, first a being for the whole, and then the lesser estates are carved out of it.

Or to commence in futuro.

21. A rent charge *de novo* may be granted so as to commence *in futuro*; for this is not like the case of lands, where the livery must carry the freehold immediately; and where the abeyance, for want of distinguishing in whom the freehold is, may be of prejudice to the rights of others. But the grant of a rent *de novo* is not attended with the like inconvenience; for no man can have a precedent right to a thing which is created by the grant itself.

Gilb. 60.

22. A rent *in esse*, or already created, cannot however be granted, to commence *in futuro*; because to

such a rent there may be a precedent title ; therefore the grant is not good. For such freeholds being thus split and severed, do hide the person in whom the right is ; by which the party that has right will not be able to discern against whom to bring his *præcipe* for recovering it.

23. A rent *de novo* may be limited so as to cease for a time only, and afterwards to revive. Thus where a rent *de novo* was granted to a man and his heirs, with a proviso, that if the grantee died, his heir within age, then the rent should cease during his minority. The grantee died, leaving his heir within age ; the widow of the grantee brought a writ of dower against the terretenant ; it was held in parliament that the demandant should have execution against the heir, when he came of age.

Or to cease
for a Time
only.

Fitz. Ab.
Dower, 143.
Jenk. Cent.
1 Ca. 6.

24. Rents are expressly mentioned in the statute 27 Hen.VIII. c.10. : they may therefore be conveyed to uses, and will be executed by the statute ; which not only transfers the rent, but also all remedies and rights given for the recovery thereof. But that statute does not transfer collateral rights.

Are within
the Statute
of Uses.
Tit. 11. c. 3.

25. T. C. granted a rent charge of 200*l.* a year to trustees, in trust for Mary Cook, to hold to them, their heirs, executors, administrators, and assigns, in trust for the said Mary for life ; with a clause of distress, and a covenant to pay the rent charge to the trustees for the use of the wife. The Court was of opinion that this rent charge was executed by the statute of uses, by the express words thereof, which execute such rents granted for life, upon trust ; and transfers all rights and remedies incident thereto, together with the possession, to the *cestui que use* ; so that though the power of distraining was limited

Cook v.
Herle,
2 Mod. 138.

to the trustees by the deed, yet by the statute, which transferred that power to Mary Cook, she might distrain also. But the covenant, being collateral, could not be transferred.

Tit. 12. c. 1.
§ 4.

26. The operation of the statute of uses is the same in the case of rents as in that of lands; for it only transfers the legal estate in the rent to the first *cestui que use*: therefore a conveyance to A. and his heirs, to the use and intent that B. and his heirs may receive a rent out of the estate, gives B. the legal estate in the rent; and if it is afterwards declared that B. and his heirs are to stand seised of that rent to uses, the intended *cestuis que use* take only trust or equitable estates.

Chaplin v.
Chaplin,
3 P. Wms.
229.
Tit. 12. c. 2.
§ 19.

27. Lady Hanby conveyed divers lands, to the use and intent that certain trustees, in the deed named, should receive and enjoy a rent charge of 30*l.* a year to them and their heirs, and then the said rent was to be to the use of Porter Chaplin in tail male, remainder over. Porter Chaplin died, leaving issue Sir John Chaplin, who married the plaintiff, and died without issue. One of the questions was, whether Lady Chaplin was dowable of this rent.

Lord Talbot was of opinion, that Sir John Chaplin having only a trust estate in this rent, his widow was not dowable of it.

Cannot be
divested.
c. 1. § 17.

5 Rep. 124 a.

28. The mode in which a seisin of a rent may be acquired, has been already stated. Where a person has been once seised or possessed of a rent, he cannot afterwards be disseised or dispossessed of it; for a rent being merely a contingent right, collateral to, though issuing out of lands, it cannot be divested: and although a person, entitled to a rent, be not in the actual receipt and enjoyment of it, yet by non-

user only, he does not cease to have a vested estate or interest therein ; so that he still continues to be in possession : therefore a rent being a mere creature of the law, is always considered to be in the possession of him whom the law adjudges to have a right to such possession. ^{1 Hawk. P.C. c. 64. § 45.}

29. Thus Lord Coke says, a man cannot be disseised of a rent service in gross, rent charge, or rent seck, by attornment or payment of the rent to a stranger, but at his election ; the rule of law being, *nemo redditum alterius, invito domino, percipere aut possidere potest*. Thus Lord Ch. B. Gilbert observes, ^{1 Inst. 323 b. Ten. 104.} that if A. is seised of a rent charge, and the tenant of the land pays it to another, this does not divest A. of his right ; because the wrongful payment of A.'s tenant cannot alter his right. It is therefore a payment in his own wrong, and the rent still remains in arrear to A. ^{Lit. § 558, 9.}

30. It should however be observed, that Littleton ^{§ 237. 240.} states several cases of disseisin of rent ; but these are only disseisins by the election of the party ; for when he wrote, an assize was, in most cases, the only remedy for the recovery of a rent, which only lay where the party was disseised. But disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the sake of more easily trying the right, is pleased to suppose himself disseised ; for as there can be no actual dispossession, ^{10 Rep. 97 a.} he cannot be compulsively disseised of any incorporeal hereditament.

31. A particular estate in a rent, or any other incorporeal hereditament, cannot be forfeited by a grant of it in fee simple, by deed : as if tenant for life or years of a rent, grants the same by deed in fee ; this is no ^{How forfeited. 1 Inst. 251 b.}

forfeiture of his estate, for nothing passes thereby but that which lawfully may pass.

32. A particular estate in a rent, or in any other
Tit. 35. c. 12. incorporeal hereditament, may however be forfeited
by matter of record, of which an account will be
given in a subsequent title.

TITLE XXVIII.

RENTS.

CHAP. III.

Of the Discharge and Apportionment of Rents.

- | | |
|--|--|
| 1. <i>Discharge of Rent Service.</i> | 24. <i>Apportionment of Rent Service at Law.</i> |
| 13. <i>Discharge of Rent Charge.</i> | 39. <i>By the Statute 11 Geo. II.</i> |
| 19. <i>Apportionment of Rent Charge.</i> | |

SECTION 1.

A RENT service being something given by way of Discharge of Retribution to the lessor, for the use and occupation of the land demised; the lessor's title to the Rent Service. *Gilb. Rents,* 145.
 rent is founded upon the principle, that the land demised is enjoyed by the tenant: but if the tenant be by any means deprived of the land demised, his obligation to pay the rent ceases, as it would be unjust that he should be obliged to make a return for that which he does not enjoy. It follows, that, if the 2 *Roll. Ab.* 489.
 tenant be evicted from the lands demised to him, he will thereby be discharged from payment of the rent. But in cases of this kind the tenant is liable to the payment of the rent which became due before the eviction; because the obligation continues as long as the consideration.

2. If the tenant be evicted by a title paramount, *Gilb. id.* before the day appointed for payment of the rent; such eviction will discharge the tenant from payment of any part of the rent.

Idem.

3. Where the lord purchases the tenancy, the rent will be discharged ; for in such case the lord cannot have both the land and the rent. Nor shall the tenant be under any obligation to pay rent, when the land, which was the consideration, is resumed by the lord. This resumption, or purchase of the tenancy by the lord, makes what is called an extinguishment of the rent.

Idem, 150.

4. If the conveyance of the land to the lord be not absolute, but upon condition ; or if it be only of a particular estate, of shorter duration than the estate which the lord has in the rent service ; in these cases, though there be an union of the tenancy and the rent in the same hand, yet as that union is only temporary, (for upon the performance of the condition, or determination of the particular estate, the tenant will be restored to the enjoyment of the land,) the obligation of the tenant to pay the rent will revive ; therefore, the rent, in such case, is only suspended, not extinguished.

Idem, 152.

5. Where a person, who has a rent service, purchases part of the land out of which the rent issues, the whole of the rent service is not thereby discharged, but only a part, proportioned to the quantity of land purchased ; because, in the case of a rent service, the tenant, being under the obligation of fealty to perform to his lord the services due for the land which he holds of him, this obligation continues while any part of the land is held by the tenant ; otherwise the remaining part of the lands would be held of nobody, and freed from all feudal services, which would formerly have been a detriment to the public. And as the tenure between the lord and tenant continued, for so much of the land

Lit. § 222.

as remained unpurchased, the tenant was, by his oath of fealty, obliged to perform the services ; but as the lord had resumed part of the land, the services were diminished in proportion to the quantity of land resumed.

6. A person who has a rent service, may release a part of it ; which will not determine the whole rent, but only the part released. 18 Vin. Ab. 504.

7. Where the law creates a duty or a charge, which the party is disabled to perform, without any default in him, and he has no remedy over, there the law will excuse. This is the principle upon which the tenant has been held, in the preceding cases, to be discharged from the payment of rent. But when the party, by his own contract, creates a charge or duty on himself, he is bound to make it good, notwithstanding any accident by inevitable necessity ; because he might have provided against it by his contract.

8. In consequence of this principle, it was resolved, that a lessee for years was bound to pay his rent, though an army had entered on the lands, and kept him out ; because the rent became due by an express agreement between the lessor and lessee, not by act in law. For an action of covenant lay against the lessee for non-payment of the rent upon the reservation, which was an agreement between them ; and there was no more reason that the lessor should sustain the damage by the enemies, than the lessee ; inasmuch as the lessee had full power of the land during the term, and, by his own contract, was to pay the rent upon all perils. Padine v. Jane,
1 Roll. Ab. 946.
Allen, 26.
Sty. 47.

9. It has been resolved, that if the lessee of a house covenants to pay rent during the term, he is compellable to pay it, though the house is burnt down, Monk v. Cooper,
2 Ld. Raym. 1477.

and the landlord is bound to rebuild it. And this doctrine has been fully confirmed in the following modern case.

Belfour
v. Weston,
1 Term R.
310. 710.

ante.

10. In a lease of a house and warehouse at Wapping, the lessee covenanted to pay the rent, and keep the premises in repair, casualties by fire only excepted. The house was burnt down by accident, and the lessor brought an action of covenant for the rent. The lessee pleaded that the house was burnt down by accident. Upon demurrer, the Court was of opinion that the point had been determined in the cases of *Padine v. Jane*, and *Monk v. Cooper*. Mr. Justice Buller read a note of the case of *Pindar v. Rutter*, at the sittings at Westminster after Mich. 1767, which was an ejectment by the tenant against his landlord, to recover the possession of some houses that had been burnt down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant on the part of the tenant to pay rent, but he had paid none subsequent to the fire. Lord Mansfield said, the consequence of the house being burnt down was, that the landlord was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The premises consisted of houses only, and the fire had made them quite useless. In March 1793, the premises were worth nothing; but the landlord, if he had insisted on the rigour of the law, might have obliged the plaintiff to pay rent for nothing, during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. Therefore he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly the defendant had a verdict.

Baker v.
Holtpfaffell,
4 Taunt. 45.

11. This doctrine does not appear to be admitted by the Court of Chancery; for, in a case of this kind in 1764, but which went off upon another ground, Lord Northington said—"The justice of the case is so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am much surprised it should be looked upon as so clear a thing, that there should be no defence to such an action at law; and that such a case as this should not be considered as much an eviction, as if it had been an eviction by title; for the destruction of the house is the destruction of the thing. Though this covenant does not extend to oblige the defendant to rebuild, yet when an action is brought for rent, after the house is burnt down, there is a good ground of equity for an injunction, till the house is rebuilt.

Treat of Eq.
B. l. c. 5. § 8.

12. In a subsequent case, Lord Apsley decided, that though the landlord was not bound to rebuild, yet the tenant was neither obliged to rebuild, nor to pay rent till the premises were rebuilt.

Steele v.
Wright,
cited 1 Term
Rep. 708.

13. With respect to the discharge of a rent-charge, it is laid down by Littleton, § 222, that if a man has a rent-charge issuing out of certain lands, and purchases any part of them, the rent-charge is extinct. Lord Coke says, the reason is, because the rent is entire and against common right, and issuing out of every part of the land; therefore, by purchase of part, it is extinct in the whole.

Discharge of
Rent Charge.

14. Lord Ch. B. Gilbert observes, that the reason of the difference between this case and that of the purchase of part of the lands out of which a rent service issues, is, because in the case of a rent charge, there is no connexion of tenure between the grantor and grantee, as there is in the case of a rent service.

1 Inst. 147 b.

Rents, 152.

And as grants of rent charges were of no benefit to the public, and afforded no additional strength or protection to the kingdom, the law carried them into execution only so far as they could take effect, according to their original intention; therefore, where the grantee, by his own act, prevented the operation of the grant, according to its original intention, the whole grant determined.

1 Inst. 147 b. 15. If the grantee of a rent charge purchases parcel of the land, and the grantor, by his deed, reciting the said purchase of part, grants that he may distrain for the said rent in the residue of the land, this amounts to a new grant.

18 Vin. Ab.
504.

16. If a person, having a rent charge issuing out of three acres of land, releases all his right in one acre, the rent is extinct; because all issues out of every part, and it cannot be apportioned. But if a person has a rent charge of 20s., he may release to the tenant of the land 10s., and reserve part; for the grantee deals only with that which is his own, namely, the rent, and not with the land.

1 Inst. 148 a.
3 Vin. Ab.
10, 11.

17. It frequently happens in practice, that a person entitled to a rent charge is disposed to exonerate part of the lands from the payment of it; but, in consequence of the above doctrine, difficulties have arisen in settling the mode of effecting such exoneration, without risking the entire extinguishment of the rent charge. The common mode has been for the grantee of the rent charge to join in the conveyance of the lands, which operates as a release of the lands conveyed, from the payment of the rent charge, and to insert a proviso in the deed, that the other lands shall continue subject to the rent charge. And it is held, that this proviso operates as a new grant of the rent charge. To this mode, however, there is a material objection: for such new grant would be

subject to any incumbrances created subsequent to the grant of the original rent charge, but prior to the conveyance of part of the lands.

18. Another mode is sometimes adopted : that is, to obtain a covenant from the grantee of the rent charge, that he will not distrain or enter on the premises conveyed for the recovery of his rent charge. But there is a case, in which one of the Judges held, that such a covenant would operate as a release of the whole rent charge ; though Anderson was of a different opinion.

Butler v. Monnings, Noy, 5. Deux v. Jefferies, Cro. Eliz. 352.

19. There are many cases in which rents may be apportioned, as well by the act of the party as by act of law. Thus, where the grantee of a rent charge releases part of the rent to the tenant, such release will not extinguish the whole rent, but the part not released will still continue.

Apportionment of Rent Charge. Gilb. 163. 18 Vin. Ab. 504.

20. So if the grantee of a rent charge conveys part of it to a stranger, and the tenant of the land attorns, such grant will not extinguish the residue, not parted with : because such release or disposition makes no alteration in the original grant ; nor does it defeat the intention of it, as the purchase of part of the land does ; for the whole rent is still issuable out of the whole land, and charged according to the original intention of the grant. Besides, since the law allowed of such grants, and thereby established this kind of property, it would have been unreasonable and severe to hinder the proprietors of rent charges from dividing them, for the promotion of their children.

Idem.

21. Lord Ch. B. Gilbert observes, that the objection which has been made to this kind of apportionment of rent charges is this : that the tenant would be thereby exposed to several suits and distresses for a thing, which, in its original creation, was entire. But the answer is obvious, that it is in the tenant's

Rents, 164. Cro. Eliz. 742.

choice whether he will submit himself to this inconvenience by his attornment to the grant of a part of the rent charge. Now the necessity of an attornment is taken away, but still a division or apportionment of a rent charge, by a conveyance of part of it to a stranger, is held good.

Wotton v.
Shirt,
Cro. Eliz.
742.
Gilb. 165.

22. A rent charge may be divided and apportioned by act in law: for a part of a rent charge may be extended by a *scire facias*. And though it was said that the tenant was thereby, without his attornment, made liable to several suits and distresses, yet it was an inconvenience which he might avoid, by a punctual payment of his rent.

Lit. § 224.
Gilb. 156.

23. If part of the lands subject to a rent charge descend to the grantee, it shall be apportioned according to the value of the land; for in this case the grantee is perfectly passive, and does not concur, by any act of his, to defeat the intention of the grant.

Apportion-
ment of Rent
Service at
Law.

24. With respect to the apportionment of rent service, it has been stated in sect. 5, that where a person having a rent service, purchases part of the land out of which it issues, the rent service is not extinguished, but shall be apportioned according to the value of the land; so that the purchase shall operate as a discharge to the tenant for so much of the rent as is equal to the value of the land purchased.

Lit. § 222.
Gilb. 165.

25. This rule only applies to such services as are divisible in their nature, such as rent; for with respect to indivisible services, as where the tenant is bound to render a horse, a hawk, or such like, though the lord purchases part of the tenancy, yet, as there can be no apportionment of these services, they shall become extinct, and the tenant will be discharged from them: for the whole tenancy being equally

chargeable, the lord by his own act shall not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage.

26. Where such entire service is for the benefit of the public, as castle guard, cornage, &c., or to repair a bridge or way, or to keep a beacon, or for the advancement of justice; or if it be a work of piety; in all such cases the tenant is still chargeable for the whole services: for the thing is in its nature indivisible; and the whole shall not be extinguished, because the public has an interest in such services; and shall not be prejudiced by the private transactions of the parties.

1 Inst. 149 a.
Gilb. 166.

27. Lord Coke says, if there be lord and tenant by fealty and heriot service, and the lord purchase part of the land, the heriot service is extinct, because it is entire and valuable. But it is otherwise in the case of heriot custom.

1 Inst. 149 b.
Talbot's
Case,
8 Rep. 104.
Tit. 10. c. 4.
§ 57.

28. Where part of the tenancy comes to the lord by descent, the services are not extinct, though indivisible.

29. It was formerly doubted whether a rent service incident to a reversion, might be apportioned by a grant of part of the reversion; or whether the whole rent should not be extinct and lost. For since the reversion and rent incident thereto were entire in their creation, it was thought hard that they should be divided by the act of the lessor, and the tenant thereby made liable to several actions and distresses.

Gilb. 172.

30. It has, however, been long settled, that where part of the reversion is granted away, the rent shall be apportioned; for the rent is incident to the reversion. Therefore if a person makes a lease for three years of land, reserving three shillings rent; as he may dispose of the whole reversion, so may he also

Collins v.
Harding,
13 Rep. 57.
Gilb. 173.

dispose of any part of it, since it is a thing in its nature severable: and the rent, as incident to the reversion, may be also divided, because that being a retribution for the land, ought to be paid to those who are to have the land upon the expiration of the lease. Hence it is that the rent, or a proportionable part thereof, passes immediately with the reversion, without any express mention being made of it in the grant.

Ardo v.
Watkins,
Cro. Eliz.
637. 651.

31. A rent service may also be apportioned by a devise of it to several persons. As where A. leased to B. rendering 10*l.* rent; and then devised 6*l.*, part thereof to C., D., and E., severally, to each of them a third part; it was resolved, that an action of debt was maintainable by one of the devisees. And it was said, that though the lessee by this means became subject to several distresses and actions, without attornment, yet these were mischiefs which he might prevent, by a punctual payment of his rent.

ante, § 2.

1 Inst. 148 b.

32. It has been stated that a rent service is discharged by the eviction of the tenant out of the whole land, from which the rent issues; but where only part of the land is evicted, the rent will be apportioned.

33. Where a right of common is established on land demised, the rent cannot be apportioned at law, as there is no eviction. And in a case of this kind, the Court of Chancery refused to apportion the rent, because the lands were worth more than what was reserved.

Jew v. Thirk-
well, 1 Cha.
Ca. 31.

34. The plaintiff was lessee of divers lands, where upon an entire rent was reserved: afterwards the inhabitants of the town where part of the land lay, claimed a right of common there, and upon a trial established it. This not being an eviction of the

land at law, because the soil was not recovered, there could be no apportionment of the land at law ; therefore a bill was brought to have the rent apportioned in equity. Serjeant Maynard insisted that such an apportionment had frequently been decreed in equity : but it appearing that the lands were worth the rent reserved, and more, the Court would not decree an apportionment.

35. With respect to those cases where a rent service shall be apportioned by the act of God, it is said in Roll's Abridgement, that if a man leases land for Vol. 1. 236. life or years, rendering rent, and after part of the land is surrounded by water, this will not make any apportionment of the rent, because the soil remains, and may be regained again : but if part of the land be surrounded or covered with the sea, this will make an apportionment of the rent ; for though the soil remains to the lessee, yet, by ordinary intendment, there is no probability of regaining it.

36. If land demised be burnt by wild fire, yet the Idem. rent shall not be apportioned, for the land remains notwithstanding ; and cannot be so consumed but that some benefit may be made of it.

37. A rent service may also be apportioned by act of law : as where a moiety of a reversion is extended upon a writ of *elegit*, the rent shall be apportioned, and the lessor shall have half of it, as incident to the reversion that remains in him. Campbell's Case, 1 Roll. Ab. 237. Tit. 14. § 44.

38. So where a husband leases for years, reserving Idem. rent, and dies, and his widow recovers a third part of the reversion for her dower, she shall have the same proportion of the rent : for in all these cases the law apportions the rent, in the same manner as it disposes of the reversion.

By the
Statute
11 Geo. 2.

Jenner v.
Morgan,
1 P. Wms.
392.

39. At common law, if a tenant for life died before the day on which the rent became due, where the lease determined by the death of the tenant for life, his executors could not claim an apportionment of the rent; nor could the remainder-man or reversioner claim that part of it which accrued during the life of the tenant for life: so that the tenant paid nothing.

40. This defect in the law produced the statute 11 Geo. II. c. 19. § 15., by which it is enacted, "That where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of lands, tenements, or hereditaments, which determined on the death of such tenant for life; that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid; making all just allowances, or a proportionable part thereof accordingly."

41. This statute only extends to rents reserved on leases which determine by the death of the lessor; for where the lease does not determine on that event, the person in remainder or reversion becomes entitled to the whole rent due from the day of payment preceding the death of the tenant for life.

42. The Court of Chancery has extended this statute to the executors of a tenant in tail, who died without issue some days before the rent became due.

43. Tenant in tail, remainder to the defendant in fee, leased for years; and died without issue a week before the day of payment of the half year's rent. The lessee at the day paid all the half year's rent to the defendant: the executor of the tenant in tail brought his bill for an apportionment of the rent. Lord Chancellor Hardwicke—"This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are two grounds for relief in equity. The first arises on the statute 11 Geo. II.: the second arises on the tenant's having submitted to pay the rent to the defendant. The relief, arising upon the statute, is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinate estate, died but a day before the rent, reserved on a lease of his, became due, the rent was lost: for no one was entitled to recover it. His representatives could not, because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant: nor could the remainder-man, because it did not accrue in his time. Now, this act appoints apportioning the rents, and gives the remedy. But there are two descriptions of persons, to whose executors the remedy is given: in the preamble it is one, having only an estate for life; in the enacting part, it is tenant for life. Now, tenant in tail comes expressly within the mischief: I do not know how the Judges at common law would construe it; but I should be inclined in this Court to extend to them. I should make no doubt, where this is the case of

Pagett
v. Gee,
Burn's Just.
vol. 1. p. 481.
Ambler's
Rep. 198.

tenant in tail after possibility of issue extinct: for he is considered in many respects, as tenant for life only. He cannot suffer a recovery: he may be enjoined from committing waste, such as hurts the inheritance, as felling timber; though not for committing common waste, being considered as to that as tenant in tail. Where it is the case of tenant for years determinable on lives, he certainly must be included within the act; though it says only tenant for life: it would be playing with the words to say otherwise. These cases show the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life: for he has the inheritance in him, and may, when he pleases, turn it into a fee; but, if he does not, at the instant of his death he has but an interest for life. Such too is the case of a wife, tenant in tail *ex provisione mariti*: upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this; *equitas sequatur legem*: where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to the maxims of the common law, why not as to the reasons of the acts of parliament? Nay, it has actually done so on the statute of forcible entry, on which this Court grounds bills, not only to remove the force, but also to quit the possession. This Court extends the reason to equitable interests, but I ground my opinion, in this case, on the tenant's having submitted to pay the rent. He has held himself bound in conscience, for the use and occupation of the land the last half year: he paid it to the defendant, which he was not bound to do in law. And, in such a case, the person

he pays it to shall be accountable, and considered as receiving it for those who are inequity entitled thereto. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent, as accrued during the testator's life. Accordingly it was so decreed.

44. In a subsequent case, where a person held from year to year under a tenant in tail, the Court of Chancery decreed an apportionment.

45. H. Vernon being tenant in tail of estates in the county of Sussex, died on the 17th of March, an infant, by which John Vernon, one of the plaintiffs, became tenant in tail of the estate: part of the lands was occupied by persons holding from year to year, under the guardian; and their rents were payable at Lady and Michaelmas-day, which demises expired by the death of H. Vernon. These rents having been paid to the receiver, the question was, whether the administratrix of H. Vernon was entitled to a proportion of the rents, or the remainder-man was entitled to the whole.

Vernon v. Vernon, 2 Bro. R. 659.

The Master reported, that a proportion of the rent was due to H. Vernon on the day of his death: to which the remainder-man took an exception, that he ought to have certified that no sum was due to H. Vernon on the day of his death; in regard that he was tenant in tail of the estates of which the Master certified the said rents or proportions to be due.

Lord Thurlow—"The case of Pagett and Gee seems rather to be a decision what the statute ought to have done than what it has done: but the question here seems to turn on another ground; that the tenant holding from year to year, or from period to

period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favour, that he should hold without paying rent to any body."—The exception to the Master's report was over-ruled.

Hawkins
v. Kelly,
8 Ves. 308.

TITLE XXIX.

DESCENT.

CHAP. I.

Of the Title to Things Real.

CHAP. II.

Of Descent and Consanguinity.

CHAP. III.

Of the Rules or Canons of Descent.

CHAPTER IV.

Of the Descent of Estates in Remainder and Reversion.

CHAPTER V.

Of Descents by Statute and Custom.

CHAP. I.

Of the Title to Things Real.

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| 2. Nature of a Title. | 13. Discontinuance of Estates. |
| 3. Possession. | 16. What constitutes a complete Title. |
| 4. Effect of an Entry. | 18. Title by Remitter. |
| 6. Right of Possession. | |
| 12. Right of Property. | |

SECTION 1.

HAVING treated of the several kinds of real property, both corporeal and incorporeal, and of the estates that may be had therein; it will now

be necessary to consider the title to real property, with the manner in which it may be acquired or lost.

Nature of
a Title.

1 Inst. 345 b.

2 Comm.
c. 13.

2. A title is thus defined by Lord Coke, *Titulus est justa causa possidendi id quod nostrum est*. Or it is the means whereby the owner of lands hath the just possession of his property. But Sir W. Blackstone observes, that there are several stages or degrees requisite to form a complete title to lands and tenements.

Possession.

3. The first degree of title is the bare possession, or actual occupation of the estate, without any apparent right, or any pretence of right, to hold and continue such possession. This may happen where one man disseises another; or where, after the death of the ancestor, and before the entry of the heir, a stranger abates, and holds out the heir. In these cases the disseisor or abator has only a mere naked possession, which the rightful owner may put an end to, by an entry on the land; but in the meantime, till some act is done by the rightful owner, to divest this possession, and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title; at all events, without such actual possession, no title can be completely good.

Effect of an
Entry.

Tit. 1. § 24.

1 Inst. 252 b.

4. The necessity of an entry by the heir, upon the death of the ancestor; or, where that is prevented, of a continual claim, has been already stated. In the case of a disseisin or ouster, there must also be an entry. And if there be two disseisors, the disseisee must make his entry on both; or if one disseisor has conveyed the lands with livery to two or three per-

sons, an entry must be made on each of them. But if the disseisor has let the lands to several persons for years, an entry on one of the lessees, in the name of the whole, will be sufficient to revest all.

5. The effect of an entry or claim is, to put the person who enters or claims, into the actual possession and seisin in deed of the lands. Thus Littleton says—"By such entry he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel." And speaking of continual claim, he says—"presently by such claim he hath a possession and seisin in the lands, as well as if he had entered in deed; although he never had possession or seisin of the same lands or tenements before the said claim." § 417, 418. § 419.

6. The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is in another. Thus in the case of a disseisin, abatement, or intrusion, the right of possession is in the disseisee or his heir, who may exert it whenever he thinks proper, by an entry; and the actual possession is in the disseisor, abator, or intruder. Right of Possession.

7. In the case of an abatement or intrusion, the descent of the lands tolls the entry: for the law presumes that the possession which is transmitted from the ancestor to the heir, is rightful, until the contrary be shown. So that in general no person can recover possession by mere entry, on lands which another hath by descent. 1 Inst. 237 b.

8. It is however enacted, by the statute 32 Hen. VIII. c. 33., that the dying seised of any disseisor of or in any manors, &c. having no right or title therein, shall not be taken or deemed to be such descent in law for

to toll or take away the entry of any persons, except that such disseisor hath had the peaceable possession of such manors, &c. whereof he shall so die seised, by the space of five years next after the disseisin, without entry or continual claim. But the feoffee of

1 Inst. 238 a. a donor, and abators and intruders, are out of this
256 a. statute, because it is penal.

Lit. § 402. 9. Where a person who has a right of entry is under any legal disability, such as infancy, coverture, imprisonment, insanity, or absence from the realm; a descent will not take away the right of entry.

10. The right of possession is of two sorts, an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents.

Gilb. Ten. 21. Thus where a person was disseised, the disseisor had only the naked possession, because the disseisee might enter, and evict him; but against all other persons the disseisor had a right, and in this respect only could be said to have the right of possession; for in respect of the disseisee, he had no right at all: when a descent was cast, the heir of the disseisor acquired the *jus possessionis*, because the disseisee could not enter upon his possession, and evict him; but was

Lit. § 385.
1 Salk. 685. put to his real action.

11. Where the person who has the actual right of possession puts in his claim, and brings his action within the time prescribed by the statutes of limitations, and can prove by what unlawful means the person in possession became seised; he will then, by judgement of law, recover that possession to which he had such actual right: but if he omits to bring his possessory action within the limited time, his adversary may imperceptibly gain an actual right of possession.

Tit. 31. c. 2.

12. When this happens, the party kept out of possession has nothing left in him but the mere right of property, or *jus proprietatis*, without either possession or the right of possession; his estate is then said to be divested, and turned to a right. It is divested because the right owner is turned out of possession; it is turned to a right, because the right of possession, and consequently the right of entry is lost; and nothing is left but the *jus merum*, or mere right of property, which cannot be regained by a possessory, but only by a real action.

Right of Property.

13. Where the right of entry into lands is lost, and the person entitled can only recover by a real action, the possession is said to be discontinued. Thus Lord Coke says, a discontinuance of estate in lands or tenements is properly, in legal understanding, an alienation made or suffered by tenant in tail, or any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

Discontinuance of Estates.

1 Inst. 325 a.

14. The instances of discontinuance mentioned by Littleton, § 593, are, 1. Where an abbot aliened the lands whereof he was seised *jure ecclesiæ*; in which case his successor could not enter into them, although the right was in him, but was put to his action. 2. Where a man seised in right of his wife enfeoffed another and died; the wife could not enter, but was put to her action. 3. Where a tenant in tail of land enfeoffs another and has issue, and dies; the issue may not enter into the land, albeit he hath right and title to it, but is put to his action.

15. In consequence of this doctrine it has been long settled, that where a tenant in tail discontinues the estate tail, which he may do by feoffment or fine,

Tit. 2. c. 2. § 6.

the person to whom the estate tail is transferred by these assurances, acquires the right of possession; and nothing remains in the issue in tail but the mere right of property.

What constitutes a complete Title.

1 Inst. 266 a.

16. The union of the possession, the right of possession, and the right of property, constitutes a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property, which is then denominated a double right: and when to this double right the actual possession is also united; where there is, according to the expression of Fleta, *juris et seisinæ conjunctio*; then, and then only, is the title completely legal.

Idem.

17. Lord Coke has thus stated the whole of this doctrine.—“It is to be known that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of property and possession. And this is anciently called *jus duplicatum*, or *droit droit*. For example, a man may be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis*.

Title by Remitter.

§ 659.

18. Littleton says, where a man has two titles to lands, one a more ancient, and the other a later title, if he comes to the land by the later title, yet the law will adjudge him in by force of the elder title, because it is the most sure; and when a man is adjudged in by force of his elder title, this is said a remitter in him; as if tenant in tail discontinues his estate, afterwards disseises the discontinuee, and so dies seised, whereby the tenements descend to his issue, or cousin inheritable by force of the entail; he is remitted to

the estate tail, as his elder title. For if he should be in by force of the descent, then the discontinnee might have a writ of entry *per descensum* against him, and should recover the tenements. But inasmuch as he is in his remitter, by force of the tail, the title and interest of the discontinnee is taken away and defeated.

19. A principal cause why such heir, in the case Id. § 661. aforesaid, and in other like cases, shall be said in his remitter, is, because there is not any person against whom he may sue his writ of formedon; for against himself he cannot sue, and he cannot sue against any other, none other being tenant of the freehold. For this cause the law doth adjudge him in his remitter, *scilicet*, in such plight as if he had lawfully recovered the same land against another.

20. Sir W. Blackstone has observed, that if the 3 Comm. 20. subsequent estate or right of possession be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right; therefore it is to be observed, that to every remitter there are regularly these incidents. An ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be cast upon the tenant; not gained by his own act or folly.

21. Lord Coke, however, says, that a man shall not be remitted to a right remedyless, for the which he can have no action: as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him, he shall not be remitted to his estate tail, because he could not have recovered it by any action. 1 Inst. 349 b. Moo. 115. Vide 1 Saunders' Uses, c. 2. § 6.

1 Inst. 18 b. 22. The modes of acquiring a title to real property are two only; descent and purchase. The former, where the title is vested in a person by the single operation of law: the latter, where the title is vested by the person's own act and agreement.

TITLE XXIX.

DESCENT.

CHAP. II.

Of Descent and Consanguinity.

- | | |
|---------------------------------------|---|
| 1. <i>Nature of Descent.</i> | 21. <i>But a Title may be deduced through an Alien.</i> |
| 3. <i>What goes to the Heir.</i> | 22. <i>Or Naturalized, or made Denizens.</i> |
| 5. <i>Of Consanguinity.</i> | 23. <i>Persons attainted can neither inherit or transmit.</i> |
| 8. <i>Who may be Heirs.</i> | 26. <i>Corruption of Blood.</i> |
| 9. <i>They must be legitimate.</i> | |
| 13. <i>And natural-born Subjects.</i> | |

SECTION 1.

DESCENT, or hereditary succession, is the title whereby a person, on the death of his ancestor, acquires his estate as his heir at law. An heir, therefore, is he upon whom the law casts the estate, immediately on the death of the ancestor; and an estate so descended on the heir, is, in law, called the inheritance.

Nature of
Descent.

2. Although the right of inheriting be known to the laws of every civilized country, and is founded on the best principles of reason, yet it is not derived from natural law, or which can belong to any man in a state of nature. From which it follows, that the numerous and arbitrary rules by which its course is either directed or interrupted, can never properly be esteemed or objected to, as violations of natural justice.

What goes to
the Heir.

Tit. 1. § 7.

3. Not only every thing which falls under the denomination of real estate descends to the heir, but also heir looms, and all such other chattels as are connected with the freehold ; as wainscots, benches, doors, windows, and the like.

4. Every species of tree, whether timber or not, standing at the death of the ancestor, as also their fruit, and grass actually growing, though ripe for cutting, descend to the heir ; but corn, and every other vegetable, produced annually, by labour and cultivation, goes to the personal representative of the ancestor, as a compensation for the expence of raising them.

Of Consan-
guinity.

5. The doctrine of descents, or law of inheritance in the fee simple, depends on the nature of kindred, and the several degrees of consanguinity. It will therefore be first necessary to state the true notion of this kindred, or alliance in blood.

6. Consanguinity or kindred is defined to be, *vinculum personarum ab eodem stipite descenditum* ; the connexion or relation of persons descended from the same stock. This consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a right line from the other ; as between father, grandfather, and great grandfather. Every generation, in this direct lineal consanguinity, constitutes a degree, reckoning either upwards or downwards. Collateral consanguinity is that which subsists between persons lineally descended from the same ancestor, who is the *stirps*, trunk, or common stock, but who do not descend the one from the other.

1 Inst. 23 b.

7. The method of computing the degrees of consanguinity by the canon law, which our law has adopted, is as follows :—We begin at the common

ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.

8. With respect to the persons who are capable of claiming an estate in fee simple, as the heirs of one who died seised thereof, they must be first legitimate; secondly, natural-born subjects, or naturalized, or made denizens; thirdly, not attainted of high treason or felony, or claim through any ancestor who was attainted of treason or felony.

Who may be Heirs.

9. No person can succeed to an estate as heir, who is not born in lawful matrimony; for it is a maxim of law, that *hæres legitimus est quem nuptiæ demonstrant*; and a bastard, being *filius nullius*, can neither inherit from its father nor mother; consequently can have no heirs but his own children.

They must be legitimate.

1 Inst. 7 b.

10. By the old law, if the husband was within the four seas, and his wife had issue, no evidence would be admitted to prove such issue a bastard, unless the husband was incapable of procreation. But Mr. Hargrave has observed, that this was never a universal rule; and that it has been long settled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility, or even improbability, of the husband's being the father, is admissible. And in the late claim to the earldom of Banbury, the House of Lords adhered to this principle.

1 Inst. 126 a. n. 2.

Goodright v. Saul, 4 Term R. 356.

11. With respect to posthumous children, the rule formerly was, that they must be born within nine months, or 40 weeks, after the death of the husband. But now the Courts consider nine months merely as the usual time, and do not decline exercising the dis-

1 Inst. 123 b. n. 1. Hargrave's Juris. Exer. vol. 3. 409.

Foster v.
Cook,
3 Bro. R.
347.

cretion of allowing a longer space, where the opinion of physicians, or the circumstances of the case, have required it. In a late instance, upon an issue directed out of Chancery, a child born 43 weeks, except one day, after the husband's death, was found to be legitimate.

1 Inst. 8 b.
n. 1. 123 b.
n. 1.

12. Where a widow is suspected of feigning herself pregnant, with a view to produce a supposititious child; the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether she be pregnant or not; and if she be pregnant, to keep her under a proper restraint, till she be delivered.

And natural-
born Sub-
jects.

13. No person is capable of inheriting lands, unless he is a natural-born subject, or naturalized by act of parliament, or made a denizen by the king's letters patent; and, by the common law, every person born out of the king's dominions or allegiance, was deemed an alien. But by the stat. 25 Edw. III. st. 2. it was enacted, that all children born abroad, whose fathers and mothers were, at the time of their birth, in allegiance to the King, and the mother had passed the seas with her husband's consent, might inherit, as if born in England.

14. By the stat. 7 Ann. c. 5. it is enacted, that the children of all natural-born subjects, born out of the allegiance of Her Majesty, her heirs or successors, shall be deemed to be natural-born subjects. And by the stat. 4 Geo. II. c. 21. reciting that doubts had arisen respecting the construction of the stat. 7 Ann., it is enacted, that all children born out of the ligeance of the Crown of England, or which should be born out of such ligeance, whose fathers were or should be natural-born subjects at the time of the birth of such children, should by virtue of the said act of 7 Ann. and of this act, be adjudged to be natural-born sub-

jects ; provided their fathers were not attainted of high treason, or liable to the penalties of high treason, in case of their returning to Great Britain or Ireland, or in the service of any state in enmity with the Crown of England.

15. By the statute 13 Geo. III. c. 21. it is enacted, that all persons born out of the ligeance of the Crown of England, whose fathers were or should be, by virtue of the statutes 7 Ann. and 4 Geo. II., entitled to the rights and privileges of natural-born subjects, should be deemed natural-born subjects.

16. In consequence of these statutes, all persons born out of the King's ligeance, whose fathers and grandfathers were natural-born subjects, are held to be natural-born subjects, and as such are capable of inheriting.

17. It was held in the reign of Charles I., that under the stat. 25 Edw. III. the child of an English merchant, born abroad, whose mother was an alien, should inherit. This determination was founded on the principle that the words of the stat. 25 Edw. III. *whose fathers and mothers*, should be construed in the disjunctive. But this mode of construction has been denied in the following case.

18. Henrietta Knight, a natrnl-born subject, Doe v. Jones, 4 Term R. 300. quitted the kingdom, and married Count Duroure, an alien, by whom she had a son, born abroad. The question was, whether this son was capable of inheriting lands in England, as heir to his mother.

Lord Kenyon said, that supposing there existed any doubts respecting the meaning of the stat. 25 Edw. III. yet the subsequent statutes operated as a parliamentary exposition of it ; particularly the stat. 4 Geo. II. c. 21. which had closed the question, by enacting that all children born out of the ligeance of the Crown,

whose *fathers* were natural-born subjects, should be natural-born subjects. And also the stat. 13 Geo. II. c. 21. which extended the same privilege to grandchildren; but still confined them to the paternal line: from which it clearly followed, that a person born in foreign parts, and of a foreign father, did not derive inheritable blood, in this kingdom, from his mother.

1 Vent. 422.

Collingwood
v. Pace,
1 Vent. 413.
2 Comm. 250.

19. If an alien has two sons born in England, the one may inherit from the other, though none of them can inherit to their father: for the descent between them is immediate; and one shall make his title in a writ of *mort d'ancestor* as heir to his brother, without mention of the father.

Id. 416, 417.
& 426.

20. Formerly, where an alien was *medius antecessor*, no title could be derived through him; but still an alien does not impede the descent. Thus, if an eldest son were an alien, the law took no notice of him; and the lands would descend to the younger brother. So if a person purchased land, and died, leaving no relation on the part of his father, but an alien, it would descend to the heir on the part of the mother.

But a Title
may be
deduced
through an
Alien.

21. By the statute 11 & 12 Will. III. c. 6. it is enacted, that all persons, being natural-born subjects, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or their ancestor, through whom they derive their pedigree, were born out of the King's allegiance. But by a subsequent statute, 25 Geo. II. c. 39., it is provided, that no right of inheritance shall accrue, by virtue of the former statute, to any person whatsoever, unless they are in being, and capable to take as heirs, at the death of the person last seised: with an exception to the case where lands shall descend to the daughter of an alien;

which descent shall be devested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters; according to the usual rule of descents.

infra, c. 3.

22. Where an alien is naturalized by act of parliament, he becomes as capable of inheriting, as if he were a natural-born subject. If an alien be made a denizen by the King's letters patent, and then purchases lands, his son born before his denization cannot by the common law inherit those lands: but a son born afterwards may, even though his elder brother were living. For the father before denization had no inheritable blood to communicate to his eldest son; but by denization it acquired an hereditary quality, which was transmitted to his subsequent posterity. If he had been naturalized, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.

Or naturalized, or made Denizens.

1 Inst. 8 a.
129 a.

23.* Persons attainted of high treason or felony are incapable of inheriting lands, or of transmitting them by descent to their posterity. Thus Lord Coke says,—“ If a man be attainted of treason or felony, he can be heir to no man, nor any man heir to him; *propter delictum*; for that by his attainder his blood is corrupted; and this corruption of blood is so high, as it cannot absolutely be salved and restored, but by act of parliament.”

Persons attainted cannot inherit or transmit.

1 Inst. 8 a.
391 b.

24. A person may however inherit from one of his parents, though the other were attainted of treason or felony; for *duplicatus sanguis* is not necessary in descents.

Thus it is stated by Jenkins to have been resolved in the Exchequer Chamber, that where an attainted person married an heiress, and had issue by her, that

Cent. 1. Ca. 2.
Cent. 5.
Ca. 27.
Noy, 165.
2 Hawk. P. C.
c. 49. § 49.

issue should inherit ; for the marriage was lawful, and the issue claimed only from the mother.

1 Inst. 163 b. 25. Lord Coke says, if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony ; the father dies, both daughters alive ; the one moiety shall descend to the one daughter, and the other moiety shall escheat.

Corruption
of Blood.
1 Inst. 391 b.

26. There is a farther consequence of an attainder for treason or felony, which is, the corruption and extinction of all hereditary blood in the person attainted ; by which he is rendered not only incapable himself of inheriting, or of transmitting his own property by heirship ; but he will also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him, from any remote ancestor.

Law of
Forfeiture,
4th ed. 72.

27. This doctrine is thus explained by the Hon. Charles Yorke :—" It is a principle in all states, where a man is neither a subject by birth, or express compact, or has voluntarily renounced the mutual obligations, to consider him as *not* within their obedience, or even notice : but when he has forfeited his civil rights by crime, he is regarded as still subject to their power ; and in every respect within the strict consideration of the law : that the ancient common law of England clearly proceeds upon this principle. Where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being unknown to the law, he was excluded from inheriting, and the next of kin within the allegiance, who did not claim under him, was admitted : or where he had incurred civil disabilities, by his own voluntary act, not criminal ; as one who entered religion, or abjured the realm, he was taken to have

undergone civil death, and the next in descent entered. But where he is attainted of treason or felony, the law will not pass him over, and marks him out, *in rei exemptionem et infamiam*. Hence it is, that though he was never in possession, nor those who claim under him more capable of inheriting than he, by reason of the consequential disability arising from the attainder of the ancestor; yet the estate will be interrupted in its course to the collateral; and escheat."

28. Thus it is laid down by Lord Hale, that if there be grandfather, father, and son, and the father is attainted and dies in the lifetime of the grandfather, the son cannot inherit an estate in fee simple from the grandfather: because he must necessarily derive his descent through his father; which he cannot do by reason of the attainder. P. C. part 1.
316.

29. Where there were two brothers, and the youngest had issue a son, and was attainted of high treason, and executed; it was held that this son could not inherit from his uncle; because he must of necessity derive his descent through his father. Grey's Case,
Dyer, 274.
Cro. Car.
543.

30. A. and B. were brothers, A. was attainted, and had issue C., and died: C. purchased lands and died without issue. Held that B., his uncle, could not inherit from him; because he must derive his descent through A., who was the *medius ancestor*, and incapable. 1 Vent. 416.
426.

31. If a man has two sons, and the eldest is attainted, and afterwards the father dies seised of an estate in fee simple, the younger brother cannot inherit from the father; for the elder brother, though attainted, is still a brother, and no other can be heir to the father, while he is alive. Dyer, 48 a.

This was considered as such a hardship, that in 1 Hen. IV. a petition was preferred by the Commons Rot. Parl.
vol. 3. 440.

to the King, praying, that where the eldest son, during the life of the father, was attainted, the next brother might notwithstanding succeed, as heir to his father: to which the King answered,—“ Let the common law run.”

32. It is however a general rule, that the attainder of a person who need not be mentioned in the derivation of the descent, does not impede, let the ancestor be never so remote: therefore, where a person may claim as heir to an ancestor, without being obliged to derive his descent through an attainted person; he will not be affected by his attainder.

Hob. 334:
Cro. Car.
435.
Hale, P. C.
ante.

33. Thus, in the case of the attainder of an elder son, if such elder son dies in the lifetime of his father, without issue, the younger son will then inherit from the father; because he can derive his descent from him, without claiming through or mentioning his elder brother.

1 Inst. 8a.
Hoby's Case,
Palm. 19.

34. Lord Coke says, if a man has issue two sons, and after is attainted, and one of the sons purchases lands, and dies without issue, the other brother shall be heir; for the attainder of the father only corrupts the lineal blood, and not the collateral blood between the brothers, which was vested in them before the attainder. But some held, that if a man, after attainder, have issue two sons, the one of them cannot be heir to the other, because they could not be heir to the father; for that they never had any inheritable blood in them. It is however now settled, that the descent between brothers is immediate; therefore that the attainder of the father does not prevent his sons from inheriting from each other; for though the father is *medium differens sanguinis*, yet he is not *medium differens hereditatis*.

Collingwood
v. Pace,
1 Vent. 413.
3 Salk. 129.

35. Sir W. Blackstone observes, that corruption of blood being looked upon as a peculiar hardship, therefore in most, if not all, the new felonies, created by parliament since the reign of Henry VIII., it is declared that they shall not extend to any corruption of blood.

36. By a statute passed in 7 Ann. it was enacted, that corruption of blood should cease upon the death of the two grandsons of James II. It has however been revived by a modern statute, 39 Geo. III. c. 93. But by a subsequent one, 54 Geo. III. c. 145., it is confined to high treason, petit treason, and murder; and to the crime of abetting, procuring, or counselling the same *.

* With respect to restitution of blood, vide Title 26. c. 2. § 44.

TITLE XXIX.

DESCENT.

CHAP. III.

Of the Rules or Canons of Descent.

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| <ul style="list-style-type: none"> 1. 1st Canon. Inheritances lineally descend. 2. Rule that <i>nemo est hæres viventis</i>. 3. The Ancestor must die seised. 7. Exceptions to this Rule. 10. Explanation of the first Canon. 11. A Descent may be defeated by a nearer Heir. 16. Exclusion of the ascending Line. 21. 2d Canon. Males preferred to Females. 22. 3d Canon. The eldest Male succeeds. 25. But Females equally. 26. 4th Canon. Right of Representation. 30. 5th Canon. Collateral Descents. 31. The Heir must be descended from the first Purchaser. | <ul style="list-style-type: none"> 36. Descents ex parte paterna et materna. 37. What Acts will alter the Descent. 45. What Acts have not that Effect. 50. Rule of Collateral Descents. 51. 6th Canon. Proximity. 52. And Exclusion of the Half Blood. 55. What Seisin necessary. 66. Trust Estates are within the Rule. 68. And Advowsons, Tithes, Rents, &c. 72. 7th Canon. The Male Stocks preferred. 74. Mode of tracing an Heir at Law. 93. Observations on Blackstone's Doctrine of Descents. |
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SECTION 1.

1st Canon.
Inheritances
lineally descend.

THE first rule or canon of descent, as laid down by Sir W. Blackstone, is,—“ That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ascend.”

To explain this, and the subsequent canons of descent, it will be necessary to premise some rules and principles of the common law, which are applicable to this subject.

2. It is a rule of the common law, that no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead, *nemo est hæres viventis*. Before that time, the person who is next in the line of succession is called an heir apparent, or an heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive their ancestor; as the eldest son, or his issue; who must, by the course of the common law, be heir to the father, whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born.

Rule that
Nemo est
hæres vi-
ventis.

3. Another rule of the common law respecting descents is, that no person can properly be such an ancestor, as that an inheritance can be derived from him, unless he has had actual seisin. Or, as Lord Coke expresses it,—“A man that claimeth as heir in fee simple to any man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance.” And Lord Hale says—“The last actual seisin in any ancestor, makes him, as it were, the root of the descent, equally, to many intents, as if he had been a purchaser: and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit.”

The Ancestor
must die
seised.

1 Inst. 11 b.

Hist. c. 11.

2 Comm. 209. 4. Sir W. Blackstone says, the law requires this notoriety of possession; as evidence that the ancestor had that property in himself, which is to be transmitted to his heir. The seisin, therefore, of any person makes him the root or stock from which all future inheritance, by right of blood, must be derived; which is briefly expressed in the maxim of Flota, *seisina facit stirpem*.

Tit. 1. § 23. 5. The nature of seisin, and the difference between seisin in deed, and seisin in law, has been explained in a former title. It is therefore sufficient here to observe, that when a person acquires an estate in fee simple in land by descent, it is necessary that he should enter on the lands to gain a seisin in deed, in order to transmit it to his heir; for if he has a seisin in law only, it will not be sufficient.

Id. 15 b. 6. The rule is the same with respect to incorporeal hereditaments. So that where an advowson in gross, or a rent, descends to a person, he must actually present to the church, and receive the rent, before he can become the stock of a descent: but if the advowson be appendant to a manor, there actual seisin of the manor will give a seisin of the advowson.

Exceptions to this Rule. 7. Where an ancestor acquires an estate by his own act, that is, by purchase, he is in many cases allowed to transmit it to his heirs, though he never had actual seisin of it himself. Thus it is laid down 1 Rep. 98 a. *arguendo*, in Shelley's case, that if a fine was levied to A. in fee, and afterwards, but before execution, A. died, his heir might enter; and though he were the first that entered, yet he should be in by descent. It being a rule, that where the heir takes any thing which might have vested in the ancestor, the heir should be in by descent. It was however observed,

that in a case of this kind the heir would not have been in directly by descent, either to be in ward, or to have had his age, or to have tolled the entry of one who had right.

8. In the case of an exchange, if both parties die before either enters, the exchange is totally void; but if one of the parties enters, and the other dies before entry, his heir may enter, and shall be in by descent. Id. 98 b.
Tit. 32. c. 6.

9. Trust estates or equitable interests in lands or tenements may be transmitted to the heir, by an ancestor who never had obtained any kind of seisin of possession whatever. Thus where a person contracts for the purchase of a real estate, and dies before it is conveyed to him, his equitable interest will descend to his heir, if not disposed of by will. Potter v.
Potter,
1 Ves. 437.

10. We now return to the first canon of descent, in consequence of which, whenever a person dies seised in fee simple of a real estate, leaving issue, it immediately descends to such issue, on whom the freehold in law is cast before entry. Explanation
of the First
Canon.

11. It being a rule of law that the freehold shall never, if possible, be in abeyance, lands always descend to the person who is heir at the time of the death of the ancestor; but such descent may be defeated by the subsequent birth of a nearer heir. A Descent
may be de-
feated by the
Birth of a
nearer Heir.
1 Inst. 11 b.

12. Thus where a person dies leaving his wife *ensient*, the common law, not considering the infant *in ventre matris* to be in existence, casts the freehold on the person who is then heir. But when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him.

13. It was formerly doubted whether in a case of this kind the posthumous child was entitled to the profits from the death of his ancestor, or only from

Goodtitle v.
Newman,
infra.

the time of his birth. But in a modern case Lord C. J. De Grey laid it down as clear law, upon the authority of a case in the year books, Trin. 9 Hen. VI. 25 a. that a posthumous child was not entitled to any profits received before his birth; because the entry of the heir was congeable, till the posthumous child was born.

1 Inst. 11 b.

14. If a man has issue a son and a daughter, and the son purchases lands in fee, and dies without issue; the daughter shall inherit the land from him. But if afterwards the father has issue a son, this son shall enter into the land, as heir to his brother, and oust his sister.

Bro. Ab. Tit.
Descent,
pl. 58.

15. So where a son purchased land, and died without issue, his uncle entered as his heir; two years after the father had issue another son, and it was held that such other son might enter on his uncle.

Exclusion of
the ascending
Line.

16. The last clause of the first canon of descent, by which parents, and all lineal ancestors, are excluded from succeeding to the inheritance of their offspring, is derived from the feudal law, in which, we have seen, it was a settled maxim that the ascending line should in no case inherit. This rule was fully established in England in the time of Henry. II.; for Glanville writes, *hæreditas nunquam autem naturaliter ascendit*. And it was probably derived immediately to us from the customs of Normandy.

Dissert. c. 1.
§ 69.

Lib. 7. c. 1. §

3 Rep. 40 a.
12 Mod. 623.

17. "If (says Littleton, § 3.) there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father; the uncle shall have the land, as heir to the son, and not the father, yet the father is nearer of blood: because it is a maxim in law, that inheritance may lineally descend, but not

ascend. Yet if the son, in this case, die without issue, and his uncle enter into the land, as heir to the son, as by law he ought, and after the uncle dieth without issue living; the father shall have the land, as heir to the uncle, and not as heir to the son.

18. Lord Coke has observed on this passage, that if the uncle does not enter, the father cannot inherit from him; because he must make himself heir to the person last seised, which the uncle was not; for the person last seised was the son, to whom the father cannot make himself heir. 1 Inst. 11 b.

19. A father or mother may however be cousin to their own child, and in that relation may inherit from him, notwithstanding the relation of father or mother.

20. A son died seised of lands in fee, without issue, or brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother. And the question was, whether the mother could take as heir to her son. It was determined by Sir J. Jekyll, M. R. that though a father or mother could not, as father or mother, inherit immediately after their son, yet if the case should so happen, that the father or mother were cousin to the son, and as such his heir, they might take notwithstanding; and that here, though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin. Eastwood
v. Vincke,
2 P. Wms.
614.

21. The second canon or rule of descent is,—“that the male issue shall be admitted before the female.” Thus sons shall be admitted before daughters; or, as Lord Hale expresses it, “in descents the law prefers the worthiest of blood; therefore the son inherits and excludes the daughter. The brother is preferred before the sister; the uncle before the aunt.” But daughters succeed before collateral relations; and in 2d Canon.
Males preferred to
Females.
Hist. c. 11.

all cases of descent, females are preferred to more remote males; our law steering a middle course between the absolute rejection of females, and the putting them on a footing with males.

3d Canon.
The eldest
Male suc-
ceeds.

22. The third canon or rule of descent is,—“that where there are two or more males, in equal degree, the eldest only shall inherit, but the females all together.” The doctrine of primogeniture is also of feudal origin; for though upon the first introduction of hereditary feuds, they descended to all the sons, yet that course was changed by a constitution of the Emperor Frederick. This practice appears to have been first introduced into England by William I. but was only applied to honorary and military feuds, which could not be divided without great inconvenience.

Wright's
Ten. 31.

Lib. 7. c. 3.

23. Thus we learn from Glanville, that in the reign of Henry II. estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons. *Cum quis ergo hæreditatem habens, moriatur, si unicum filium hæredem habuerit indistinctè verum est quod filius ille patri suo succedit in totum. Si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, siue per feudum militare tenens, aut liber sokemannus; quia si miles fuerit, vel per militiam tenens, tunc secundum jus regni Angliæ, primogenitus filius patri succedit, in totum. Ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber sokemannus, tunc quidem dividetur hæreditas inter omnes filios, quotquot sunt, per partes equales.*

24. The right of primogeniture appears however to have been fully established in the reign of Hen. III. in socage lands, as well as in those held by a military service. For Bracton, in stating the law of descents,

says—*Si quis plures habet filios, jus proprietatis semper descendit ad primogenitum, eo quod ipse inventus est primo in rerum natura.*

25. As to the females, all being equally incapable of performing any military service, there could be no reason for preferring the eldest; and therefore Littleton states the law to be, that where a man or woman, seised of lands in fee or in tail, hath issue but daughters, they shall all equally inherit, and make but one heir, and are called parceners by descent.

But Females equally.

§ 241.

Tit. 19. § 1.

26. The fourth canon or rule of descent is, “That the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.”

4th Canon.
Right of Representation.

“Hence it is (says Lord Hale) that the son or grandchild, whether son or daughter, of the eldest son, succeeds before the younger son; and the son or grandchild of the eldest brother before the youngest brother. And so through all the degrees of succession, by the right of representation, the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood.”

Hist. c. 11.

27. It follows from this rule, that the nearest relation is not always the heir at law, as the next cousin *jure representationis* is preferred to the next cousin *jure propinquitatis*. And the taking by representation is called succession *per stirpes*, according to the roots; since each branch inherits the same share that their root or *stirps*, whom they represent, would have taken.”

1 Inst. 10 b.

28. “This right (continues Lord Hale) transferred by representation, is infinite and unlimited, in the degree of those that descend from the represented.”

Hist. c. 11.

For the son, the grandson, and the great grandson, and so *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had, whether it be in descents lineal or transversal; therefore, the great grandchild of the eldest brother, whether it be a son or a daughter, shall be preferred before the younger brother, because though the female be less worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger."

Idem.

29. So, "if a man have two daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies, the youngest daughter shall have an equal share with the other six daughters, because they stand in representation and stead of their mother, who could have but a moiety."

5th Canon.
Collateral
Descents.

30. The fifth canon or rule of descent is, "That on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."

The Heir
must be de-
scended from
the first
Purchaser.
1 Inst. 12 a.

31. It is a maxim of the common law, that no person can inherit an estate unless he is descended from the first purchaser or acquirer of it. This rule is to be found in the *Grand Coustumier* of Normandy, c. 25., from whence it was introduced here, and is plainly derived from the feudal law. For when feuds first became hereditary, no person could succeed to a *feudum novum* but the lineal descendants of the first acquirer, who was called the *perquisitor*. So that if a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. If it was *feudum antiquum*, that is, if it had descended to the proprietor from any

of his ancestors, then his brothers, or such other collateral relations as were descended from the person who first acquired it, might succeed.

32. When the feudal rigour was in part abated, a method was invented to let in the collateral relations of the first purchaser to the inheritance, by granting a *feudum novum*, to hold *ut feudum antiquum*; that is, with all the qualities annexed to a feud derived from his ancestors; and then the collateral relations were admitted to succeed, even *in infinitum*; because they might have been of the blood of the first imaginary purchaser. 2 Comm. 221.

33. In imitation of this rule, it has long been established in England, that every acquisition of an estate in fee simple by purchase, shall be considered as a *feudum antiquum*, or feud of indefinite antiquity: therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. Idem 222.

34. But where an estate has really descended, in a course of inheritance, to the person last seised, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them.

35. Thus Lord Hale says, if the son purchases land, and dies without issue, it shall descend to the heirs on the part of the father; and if he leaves none, then to the heirs on the part of the mother: because though the son has both the blood of the father and the mother in him, yet he is of the whole blood of the mother; and the consanguinity of the Hist. c. 11. 120.

mother are *consanguinei cognati* of the son. On the other side, if the father had purchased lands, and it had descended to the son, and the son had died without issue, and without any heir on the part of the father; it should never have descended in the line of the mother, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the grandmother; because her *consanguinei* were as well of the blood of the father, as the mother's consanguinity is of the blood of the son: consequently, also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered, and died without issue, his fathers, brothers, or sisters, or their descendants; or for want of them, his grandfather's brothers or sisters, or their descendants; or for want of them, his great grandfather's brothers or sisters, or their descendants; or for want of them, any of the consanguinity of the great grandfather, or brothers or sisters of the great grandmother, or their descendants, might have inherited; for the consanguinity of the great grandmother was the consanguinity of the father: but none of the line of the mother or grandmother, viz. the grandfather's wife, should have inherited; for that they were not of the blood of the first purchaser. And the same rule *e converso* holds in purchases in the line of the mother or grandmother: they shall always keep in the same line that the first purchaser settled them in.

Descents ex
parte paterna
et materna.

36. It follows, that where lands descend to a person on the part of his father, none of his relations

on the part of his mother can inherit them. And *vice versa* where lands descend to a person from his mother, no relation on the part of his father can inherit them. Inheritances of this kind cannot however be created by any act of the parties: for if a person gives lands to another, to hold to him and his heirs, on the part of his mother; yet the heirs on the part of the father shall inherit. For no man can create a new kind of inheritance, not allowed by the law; therefore the words, on the part of his mother, are void.

1 Inst. 12 a.
Goodtitle v.
White,
2 Bos. & Pull.
283. N. S.
1 Inst. 13 a.
Doug. R.
773.

37. Where a person is seised in fee simple by descent *ex parte paterna* or *materna*, there are many acts which may be done by such a person, that will operate so as to make him a new purchaser of the estate; by which means it will become a feud of indefinite antiquity, and descendible to his heirs general, whether of the paternal or maternal line.

What Acts
will alter the
Descent.

38. Thus Lord Coke says, if a person be seised of lands, as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and to his heirs, this is a new purchase: and if he dies without issue, the heirs of the part of the father shall inherit.

1 Inst. 12 b.

Mr. Hargrave has observed on this passage, that Lord Coke must be understood to speak of two distinct conveyances in fee. The first passing the use, as well as the possession, to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second regranting the estate to him.

So if a person seised *ex parte materna* makes a feoffment in fee, reserving a rent to himself and his heirs, this rent will go to the heirs *ex parte paterna*; because the feoffment in fee was a total disposition of the estate; and the rent was acquired by purchase.

Idem.

39. The renewal of a lease for lives being considered as a new acquisition, the person renewing becomes a purchaser, and the descent is thereby altered.

Mason v.
Day,
Prec. in Cha.
319.

40. Elizabeth Mason having purchased a lease for three lives, died, leaving Mary her daughter and heir, an infant. Two of the lives being dead, the guardians of the infant, out of the profits of the estate, took a new lease to the infant and her heirs, for three new lives; and afterwards the infant died without issue.

The question was, whether this lease should descend to the heirs of the infant *ex parte paterna* or *materna*. It was contended that it should go to the heirs *ex parte materna*, being a renewal only of the old lease, and under the old trust. For if the infant heir had died without issue before the renewal, living the surviving *cestui que vie*, there had been no question of it; and so ought the new lease, being renewed out of the profits of the old lease.

The Master of the Rolls held that the renewed lease was a new acquisition, which vested in the daughter as a purchaser; therefore it should first go to the heirs of the part of the father. The Lord Keeper Harcourt coming into Court, said he was of the same opinion,

Pierson v.
Shore,
1 Atk. 480.

41. In a subsequent case, exactly similar, it was objected that the renewal was an act done by a guardian only, during the minority; and ought not to prejudice any who take by representation; it being merely voluntary, and not of necessity. But Lord Hardwicke answered, that if this had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to have come into a court of equity to be relieved against it. But here was a just and reasonable occasion for what the

guardian had done : here one life being dead, surrendering the old and taking a new lease was the most beneficial purchase for the infant that could be ; therefore ought to have the same consequence as if done by the infant herself, at her full age ; and go to her heirs *ex parte paterna*. That the case of *Mason v. Day* was exactly in point.

42. A trust estate being descendible in the same manner as a legal one, where the trust estate descends from the mother, it will go to the heirs *ex parte materna* : but where the legal estate descends *ex parte materna*, and the trust estate *ex parte paterna*, or *vice versa*, the trust estate will merge in the legal, and both will follow the line through which the legal estate descended.

43. Serjeant Selby agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made ; having by his will devised all his real and personal estate to his wife, in trust to educate and maintain his son, until he should attain the age of 21 years ; and afterwards in trust to convey all the rest of his real estate to his son and his heirs. After the testator's death, the estate was conveyed to Mrs. Selby, who died before the son attained 21 ; but he afterwards attained that age, and died in possession of the estate. The lessor of the plaintiff was his heir at law on the part of his mother, and the defendants were his heirs at law on the part of his father's mother.

Goodright
v. Wells,
Doug. 771.

Lord Mansfield said,—“ Serjeant Selby, after his purchase, was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow, which conveyance was absolutely in trust for the son. He outlived his mother, by whose death the trust

estate was completely vested in him, and the legal estate descended to him from her. The question was, to whom the estate descended on the death of the son. If it descended from the mother, the lessor of the plaintiff took it as heir at law: but it was contended, that though he was heir, there was a trust for the paternal heirs; and it was said to be settled, that the Court would not suffer a trustee to recover in ejectment against a *cestui que trust*. A case so circumstanced as this in every particular, probably never existed before, and perhaps never might again; but cases must often have happened in which the general question would arise, viz. whether, when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estates should open on his death, and be severed for the different heirs. Consider first upon authority, and secondly upon principle. First, no case had ever existed where it had been so held; none where the heir at law of one denomination had, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination; who would have taken the equitable estate, if that and the legal estate had not united. Secondly, on principle, it seemed to him impossible; for the moment both met in the same person, there was an end to the trust: he had the legal interest and all the profits by his best title. A man could not be trustee for himself. Why should the estates open upon his death? What equity had one set of heirs, more than the other? He might dispose of the whole as he pleased: if he did not, there was no room for Chancery to interpose; and the rule of law must prevail. *Quacunque via data*, therefore, the legal estate must prevail. If the question was doubtful, then of K. B. the legal right must pre-

vail : if the weight of opinion and argument was, that the legal estate must draw the trust after it ; the case was still stronger against the defendant."

Judgement for the plaintiff.

44. Where an estate is devised to an heir at law, Tit. 38. c. 8. in such manner as to make him a purchaser of it, the descent will be to the heirs *ex parte paterna*.

45. No conveyance, however, of a particular estate will alter the mode of descent of the reversion ; because it is not a total departure of the estate : therefore, if a person, seised *ex parte materna*, makes a gift in tail, or lease for life, reserving rent, the heir on the part of the mother shall have the reversion ; and also the rent, as incident thereto. What Acts have not that Effect. 1 Inst. 12 b.

46. So, if a person seised *ex parte materna*, makes a feoffment in fee upon condition, his heir *ex parte paterna* shall enter for the condition broken : but the heir *ex parte materna* shall enter upon him, and enjoy the estate ; because an entry for a condition broken revests the old estate. Idem. Tit. 13. c. 2. § 51.

47. Where a person seised *ex parte materna*, makes a feoffment in fee, and the use is expressly limited to the feoffor and his heirs, or if there is no declaration of uses, and the feoffment is not on such a consideration as to raise a use in the feoffee, so that the use results to the feoffor ; in either case he is in of the ancient use, and not by purchase ; therefore the descent is not altered. 1 Inst. 12 b. 1 Rep. 100 b. Tit. 11. c. 4.

48. A person seised of lands by descent *ex parte materna*, made a feoffment of them to uses ; as to Black Acre, to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs ; and as to White Acre, to the use of himself for 99 years, if he should so long live, remainder to his wife for life, Godbolt v. Freestone, 3 Lev. 406.

remainder to his first and other sons in tail male, remainder to himself and his heirs. Adjudged, that upon the death of the husband without issue, the remainder descended to the heirs of the feoffor, *ex parte materna*; because the ancient fee remained in him.

49. Where a fine is levied, or a common recovery suffered; if the use be not altered, the mode of descent will not be changed: but there are some particular cases in which a fine, and also a recovery, will alter the descent.

Rule of collateral Descents.

50. To return to the fifth canon of descent; Sir W. Blackstone says, the great and general principle upon which the law of collateral inheritances depends, is, that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the Year Books, Fitzherbert and Hale,—“That he who would have been heir to the father of the deceased, and of course to the mother, or any other real or supposed purchasing ancestor, shall also be heir to the son.” A maxim that will hold universally; except in the case of a brother or sister of the half blood.

6th Canon. Proximity.

51. The sixth canon or rule of descent is,—“That the collateral heir of the person last seised, must be his next collateral kinsman, of the whole blood.”

2 Comm. 224.

ante, c. 2. §7.

First (says Sir W. Blackstone) he must be his next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to canonical degrees of consanguinity. The issue or descendants, therefore, of the brother of John Stiles (the *propositus* in the table of descents annexed) are

all of them in the first degree of kindred, with respect to inheritances; those of his uncle in the second, and those of his great uncle in the third; and so on, as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity. And here it must be observed, that the lineal ancestors, though, according to the first rule, incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring.

52. Secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood: for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole shall be admitted, and the other entirely excluded.

And Exclusion of the Half Blood.
2 Comm. 227.

53. By the ancient customs of Normandy, the *frater uterinus* could not inherit from his brother, when the inheritance descended from the father; and *vice versa*: from which the origin of the custom of excluding the half blood probably arose. For Bracton fo. 65 a. states it as doubtful whether the half blood, on the father's side, was excluded from an inheritance which originally descended from the common father; or only from such as descended from the respective mothers; and from newly purchased lands. It appears however from Britton, c. 119., that when he wrote, the half blood was excluded from inheriting in all cases. In 5 Edw. II. a case arose, in which it was determined, that where a person died seised of lands, leaving a sister of the half blood, and an uncle of the whole blood, the uncle should inherit, and not the sister. And in 10 Edw. III. it was held, that where a man had three daughters by one venter, and one

Grand Coust.
c. 25.

10 Assise,
pl. 27.
Bro. Ab. Tit.
Descent, 20.

daughter by another venter, and died seised of lands, and all of them entered; afterwards two of the daughters by the first venter died, that the third daughter of the first venter should be heir to them, and should have their two parts; and the fourth daughter should take nothing from them; because she was of the half blood.

54. In conformity to these cases, it is laid down by Littleton, § 6 and 7, that if a man has two sons by divers venters, and the elder purchases land in fee simple, and dies without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin shall have the same; because the younger brother is but of the half blood. So, if a man has a son and a daughter by one venter, and a son by another venter, and the son by the first venter dies without issue, his sister shall be his heir.

What Seisin
necessary.
ante, § 3.

55. We have seen that no person can be such an ancestor as that an inheritance may be derived from him, unless he had actual seisin: therefore there must be an actual seisin in deed to exclude the half blood. Thus Littleton says,—“When a man is seised of lands in fee simple, and hath issue a son and a daughter by one venter, and a son by another venter, and dies, and the eldest son enters, and dies without issue; the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to the brother: but if the elder brother doth not enter into the land after the death of his father, but dies before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father: but when the elder son, in the case aforesaid, enters after the death of his father, and hath possession, there the sister shall have the

§ 8.

land; because it is a maxim of law, that *possessio fratris, de feodo simplici, facit sororem esse hæredem.*"

56. In consequence of this principle, it is necessary to ascertain whether the heir acquired such a seisin, upon the death of his ancestor, as is required by law, to make him the stock of the inheritance: for if he has not, then the ancestor is the person who was last seised of the inheritance, to whom the claimants must make themselves heirs. Ratcliff's Case, 3 Rep. 37.

57. It has been stated that an entry or claim is, in most cases, necessary, to acquire a seisin in deed; and that where the lands lie in different counties, there must be an entry in each county. Thus where the demesnes of a manor extended into two counties, the eldest son, upon the death of his father, entered into the demesnes in one county only, and died without issue. It was said by Manwood, that his sister of the whole blood should inherit the demesnes whereon her brother had entered; and his brother of the half blood the rest. Tit. 1. § 24.
1 Leon. 265.

58. It has also been stated, that the possession of a term or for years is the possession of the person entitled to the freehold. Hence Lord Coke says, if a father makes a lease for years and the lessee enters, and the eldest son, having succeeded his father, dies during the term, before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister: because the possession of the lessee for years is the possession of the elder son; so as he is actually seised of the fee simple; and consequently the sister of the whole blood is to be heir. Tit. 1. § 28.
1 Inst. 15 a.
3 Rep. 41 b.

59. A. seised in fee had two daughters by several venters, and devised a moiety of the land to his wife for seven years; and that the elder sister should enter on the other moiety, on the day of her marriage. A. Jenk. Cent. 6 Ca. 25.

died, his wife entered and educated the daughter: the eldest sister married, and entered with her husband into one moiety: the younger sister died without issue. Resolved, that the heir of the whole blood of the younger sister should have her moiety: for the possession of the mother for seven years was an actual possession in the younger sister.

Tit. 20. § 14. 60. It has also been stated, that the possession and seisin of one tenant in common is the possession and seisin of the other; and it has been determined, that such a possession will exclude the half blood.

Small v. Dale,
Moo. 868.
Hob. 120.

61. A. had issue B. a son, and M. a daughter, by one venter, and N. and O. daughters by another venter, and devised all his lands to his wife *durante viduitate*. The wife entered into all. B. the eldest son died, without having entered. It was adjudged that the will was void for a third part, because the lands were held by knight service; that the entry of the wife into all, made her seised but of two parts, and tenant in common with her son of a third part; and that the entry of the wife should vest such a possession in common, in the son, of the third part, as should make a *possessio fratris* in him, for his sister of the whole blood.

1 Inst. 15 a.
Whitcombe
v. Whit-
combe, Prec.
in Cha. 280.

62. The possession of a guardian in socage is the possession of the ward, who thereby acquires an actual seisin, without entry; and where a posthumous son is born, his mother being in possession of the lands whereof his father died seised, she becomes his guardian in socage; and the infant son will be thereby deemed to be actually seised of the inheritance; so as to exclude the half blood.

Goodtitle v.
Newman,
3 Wils. 516.

63. A. Newman being seised in fee of four messuages, and having issue four daughters, died leaving his second wife *ensient* with a son, who was born six

weeks after the death of his father, and lived five weeks, and then died ; his mother continuing all that time in possession of the houses, residing in one of them with the two daughters, and receiving rent for the others.

The question was, whether this was such a seisin as would exclude the daughters from inheriting. It was argued for the plaintiff, the heir at law of the son of the whole blood, that the son died last actually seised in fee of the premises ; that upon the death of the father, the premises descended to his two daughters, who, together with the mother, being *ensient* with a son, were then in rightful possession ; that upon the birth of the son, six weeks after, the estate of the daughters was divested out of them, and the mother then became and was guardian in socage to her son ; that her possession, and receiving the rents and profits, was the actual possession and seisin of the son, and would carry the descent of the premises to the heir at law of the son. The infant son was in possession as much as it was possible for an infant to be ; for he was born, lived, and died in one of the houses ; which gave a title to the heir of the whole blood : for the law would presume that the mother entered rightfully, as guardian to her infant son, and not wrongfully.

On the other side, it was contended for the defendants, that the rule of *possessio fratris* was extremely severe, and ought not to be extended, but should be construed as favourably as possible for the daughters ; that to make a *possessio fratris*, there ought to be an actual seisin ; that it was not found or stated in the case, that the mother entered as guardian in socage, but that she and the two daughters continued in possession from the time of the husband's death ; that six weeks after the husband's death, the

son was born, and died in the same house : that this was a continuance of the old estate in herself and the daughters, or in the daughters only ; for the law would adjudge the possession in those who had a lawful right to the possession, namely, the daughters ; and the Court could not determine, upon the facts stated in the case, whether the mother was in possession as guardian to the son, or as a trespasser, or for her quarantine, in order to have dower.

Lord Ch. Just. De Grey having stated the case, delivered the unanimous opinion of the Court.—

“This is an ejectment brought by the heir of a posthumous son, to recover the premises in question, which were purchased by his father, who died seised thereof in fee simple, the 4th of June, 1760, leaving two daughters by his first wife, and his second wife *ensient* with this posthumous son. The wife and daughters remained in the same house where the father died : then the wife received some rent for the houses ; and afterwards, in July 1760, the son was born, and in his lifetime the widow received more rent : then the son died, having lived five weeks and three days, and she received some more rent after his death. Lands in fee simple must descend to the heir of the whole blood of the person last actually seised thereof. And this is a maxim in the law of England, which has subsisted for ages, as appears by Bracton, l. 2. fo. 65. ; Britton, cap. 119. fo. 271. ; Fleta, l. 6. cap. 1. § 14. Although this may sometimes be very hard upon some children of the half blood of the person last actually seised, yet we must take the law as it is, and determine accordingly. The question, therefore, is, whether this posthumous son was actually seised of the premises in question.

“ Upon the death of the father, his two daughters would have been good tenants to the *præcipe* before the birth of the posthumous son, who could not lay his title before he was born ; the law vested the seisin in law in the daughters upon the death of the father, and in like manner vested the seisin in law in the son the moment he was born. If the daughters had aliened, or been disseised, the son would not have been actually seised, but would only have had a right of entry upon the possession of the alienee or disseisor. This was the ground of my brother Hill’s argument ; namely, that the daughters were disseised by the mother, and that the son died having only a right of entry, so was never actually seised. But the daughters were in actual possession as well as the mother, (of one house,) from the time of the death of their father until the birth of the son ; and were also in actual possession of the other three houses, by the possession of the tenants thereof, whether any rent had been due, received, or not received, before the birth of the son. 3 Rep. 41, 42. ; Moor, 125. ; Co. Lit. 14, 15. And the rent, which was due and received before the birth of the son, belonged to the daughters, who were actually seised ; for, by Babington, (Ch. Just. C. B.) Trin. 9 Hen. VI. 25 a., if a man has issue a daughter, and dies, his wife being *ensient*, the daughter may lawfully enter ; and if she dies, her heir may enter, and take the profits for the time ; and afterwards, if the wife, being *ensient* by the ancestor paramount, is delivered of a son, the son may enter, notwithstanding that the heir of his sister is in by descent ; but he shall not have an action of account, or any remedy for the issues in the meantime before his birth ; because their entry was congeable until he was born. And if a church becomes

void, and the sister or heir present, and their presentee be instituted and inducted before his birth, he shall not have the advantage of the avoidance; and yet by such presentation he shall not be out of possession. At the time of the birth of the son, (in the present case,) his mother was in possession, as well as the daughters. The moment he was born, she became guardian in socage; and, upon supposition that nothing was done to hinder it, the law will presume that she entered as guardian to her son the moment he was born; and nothing appears to the contrary, upon the facts stated in the case. She was in, without any declaration how she was in; and acts, without any words, amount in law to an entry; for acts without words may make an entry, but words without

† Inst. 245 b. an act (viz. entry into the lands, &c.) cannot make an entry.

“ It was objected, that the mother being in one house, and receiving the rents of others, was a disseisor, or that it was in the daughters to make it disseisin, Cro. Car. 303.; and that if one enters as guardian who is not so, he is a disseisor, 1 Roll. Ab. 662. (J.) pl. 3. in answer to this. The facts in this case are, that the mother continued in possession from the death of her husband, received the rents under leases; her possession was general; it does not appear that she ousted the daughters, or made any actual or particular claim; she might continue in the house by quarantine, which continued until the son was born; and the entry of one is the entry of others, who have a right to enter. 1 Roll. Ab. 740, 741. If guardian by nurture make a lease by indenture to one, being under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant, 1 Roll. Ab. 659. pl. 13.

“ It is to be observed, that the title of the daughters expired on the birth of the son, before any election, to make the mother a disseisor, was made; that the law will not presume a wrong; there never was any determination, that the mother’s entry or possession was by wrong, in a case like this; and it is impossible to suppose, in this case, that the whole rents and profits of the premises in question were not applied by the mother to the common use of her daughters, herself, and the infant son; indeed, if the mother had entered as guardian to the daughters, she not being their guardian, it would have been a disseisin; so, if she had entered for her dower, when it was not assigned to her. The possession of the mother and daughters was the possession of the daughters; and, when the son was born, the estate was divested out of the daughters, and not before; then the son was in actual possession and seisin of the premises by his mother, who had a right to the possession, as being his guardian by law, (namely) the person next of blood, to whom the inheritance cannot descend; her possession was the possession of the son. 3 Rep. 42. Moore, 125. A guardian need not be assigned. The seisin of a guardian of a son by the second venter shall oust the daughters of the first venter. 8 Assise, 6.

“ Upon the whole, we are all of opinion, that the premises in question belong to the lessor of the plaintiff, and therefore we give judgement for the plaintiff.”

64. An entry by a mother, as guardian in socage, will give a sufficient seisin to an infant, to exclude the heir of the half blood.

65. A man died leaving two daughters by different venters; the mother entered as guardian in socage, Doe v. Keen,
7 Term R.
386.

Tit. 19. § 7.
Lit. § 396.

and received the profits. The question was, whether this gave such a seisin to the daughters, that on the death of one of them, the other could not inherit from her. It was contended, 1. That the entry of the mother as guardian in socage, and her receipt of the profits, amounted to a sufficient seisin for her daughter; that this point was sufficiently established by the preceding case. 2. That the seisin of one coparcener was the seisin of the other, and the entry of one was in law the entry of the other. Where two claim by the same title, as two sons from their father, and the younger son enters, the law will presume that his entry was not to gain a possession distinct from his elder brother, but merely to preserve the estate from a stranger; therefore, though the younger son die seised, and his heir enters by descent, yet the entry of the elder brother, or his heir, is not therefore taken away. That if the law put so favourable a construction in that case, where the younger son cannot have any claim for himself, *a fortiori* such a presumption should be made in the case of coparceners, who make but one heir; and so it was stated in 1 Inst. 243 *b.* that where one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of both, and no divesting of the moiety of her sister.

On the other side it was argued, that there was no seisin in fact by the elder sister, but at most a seisin in law; and the Court would not incline to extend the operation of the rule, excluding the succession of the half blood, beyond the strict letter of it.

Lord Kenyon said—Nothing could be clearer than that an infant might consider whoever entered on his estate, as entering for his use. The Court held that

the surviving sister did not take by descent; but the lands should go to the heir of the whole blood of the sister who died.

66. Before the statute of uses, it was held that there might be a *possessio fratris* of a use: therefore where a *cestui que use* had issue a son and a daughter by one venter, and a son by another venter, and died; the eldest son took the profits, and died without issue; it was held that the use should descend to the daughter, as sister and heir to her brother, and not to the younger son.

Trust Estates
are within the
Rule.
1 Inst. 14 b.
Dyer, 10 b.

67. Since the doctrine of trusts has been established by the Court of Chancery, the rule of *possessio fratris* is applied to trust estates, as fully as to legal ones.

68. Advowsons, tithes, and rents descend to the whole blood: but there must be an actual seisin, by presentation to the church, or receipt of the tithes or rents, to make a *possessio fratris*. So that if the eldest son dies before the church becomes vacant, or any receipt of tithes, or rent, his brother of the half blood will inherit as heir to his father, who was the person last seised.

And Advow-
sons, Tithes,
Rents, &c.
1 Inst. 15 b.
3 Rep. 41 b.

69. Thus if a person seised of an advowson in gross, has issue a son and a daughter by one venter, and a son by another venter, and dies; the eldest son dies before any presentation; the younger brother shall have the advowson, because the elder never had any seisin thereof. But if the elder had presented, and died without issue, the younger should not have had the advowson, because the presentation put the seisin in the eldest.

1 Roll. Ab.
628. pl. 10.

Id. pl. 11.

70. If two daughters by several venters make partition of an advowson in gross, to present by turns; and after one dies without issue, before any presentation; the other shall have the advowson; because

Id. 12 & 13.

there was no seisin thereof. It would have been otherwise if she that died had presented after partition.

1 Inst. 15 b.

71. Lord Coke says, the doctrine of half blood extends to offices, courts, liberties, franchises, and commons of inheritance.

7th Canon.
The Male
Stocks pre-
ferred.

72. The seventh and last canon or rule of descent is,—“That in collateral inheritances, the male stocks shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near; unless where the lands have, in fact, descended from a female.”

2 Comm.235.

73. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on. Sir W. Blackstone observes that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For when such first purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males, by virtue of the second canon, through the whole course of lineal descent, from the first purchaser, they judged it more likely that the lands should have descended to the last tenant, from his male, than from his female ancestors. The right of inheritance therefore first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in

order to find heirs that may by possibility be derived from the original purchaser.

74. After a due consideration of the canons or rules of descent already laid down, it will not be a difficult matter to ascertain the party on whom the law casts the inheritance, whenever a comprehensive genealogy shall be made out, of the persons connected in blood with the *propositus*, or party last seised: for there is no title in the English law reducible to a more technical system than the title of descent in fee simple. One or the other of two principles only will determine every case of competition on the subject of inheritance at common law; these principles are, 1st. dignity of blood, and 2d, proximity of blood.

Mode of
tracing an
Heir at Law.

75. Lord Coke, in his commentary on Littleton, has partly explained in what order the attribute of dignity of blood is applied by legal intendment. But as the whole subject is susceptible of a compendious arrangement, perhaps it may be satisfactory to enumerate the several classes which by physical necessity must comprehend every description of kindred; and to state the degree of dignity in which they stand to the *propositus*. ^{1 Inst. 10 a. 12 a.}

76. These classes are,

- 1°. The male stock of the paternal line.
- 2°. The female stock of the paternal line.
- 3°. The male branches of the female stock of the paternal line.
- 4°. The female branches of the female stock of the paternal line.
- 5°. The male stock of the maternal line.
- 6°. The female branches of the male stock of the maternal line.
- 7°. The male branches of the female stock of the maternal line.

8. The female branches of the female stock of the maternal line.

Vide Table
of Descents.

77. The reason and progress of this series will, on a little consideration, appear intelligible. They who trace from the male stock, either in the ascending or descending line, must of necessity trace from a person bearing the name of Stiles, whether it be John, Geoffry, George, Walter, or Richard; and Stiles being the family name, they are all entitled to the first rank of dignity. When these are exhausted, recourse is to be had to those female stocks who have intermarried with the males of the name of Stiles, and have contributed to the blood of the paternal line; such as Cecilia Kempe, Christian Smith, and Ann Godfrey, who constitute the second class. Every female having so intermarried, at how remote soever a period, is deemed to be a stock of the same class, and all those of the same class are held to be equal in point of dignity. It is further to be observed that each stock in the ascending line is successively to be exhausted, first in its male, and then in its female branches, before we proceed to the next immediate female stock, for reasons hereafter to be assigned; and this doctrine gives rise to the third and fourth classes, namely, the male branches of the female stock of the paternal, and the female branches of the female stock of the paternal line. The same gradation takes place in the maternal line, and gives rise to the subsequent, or 5, 6, 7, and 8, classes, on the same ground as in the paternal line; and therefore it is unnecessary to repeat them.

Thus far in explanation of the first principle.

78. The second principle, or that of proximity of blood, is twofold; it is either positive, or representative. It is positive when parties claim in their own individual right; as between the second and third son,

or between the uncle and grand uncle. It is representative when either of the parties claims as being lineally descended from another; in which case he is entitled to the degree of proximity of his ancestor. Thus the grandson of the eldest son of the *propositus* is entitled before the second son of the *propositus*, though, in common acceptation, nearer by two degrees; and the principle of representative proximity is by the law of England so peremptory, that a female may avail herself thereof to the exclusion of a male claiming in his own right; for in descents in fee simple the daughter of the eldest son shall succeed in preference to the second son.

79. Having thus explained the nature of these two principles, we proceed to observe, that the first principle, namely, that of dignity of blood, is positive, and operates on all occasions, without reference to any other principle, where it can be shown that the claimants are unequal in point of dignity of blood, and that they range under different classes of the series as above stated. In all such cases the inheritance will vest, by act of law, in the worthiest of blood. Thus if, according to the table of descents annexed, a competition should arise between the issue of Andrew and Esther Baker, and the issue of Richard and Ann Stiles, although the former represent an uncle, and the latter a great great uncle, the latter shall prevail, because he is of the first class of dignity, whereas the former falls under the fifth.

80. But when the claimants range under the same class of dignity, the first principle is inert; recourse must then be had to the second, namely, that of proximity; and the claimant shall be preferred in respect of the proximity of the stock through which he claims to the *propositus*.

81. Thus in a question between the issue of Luke and Frances Kempe, and the issue of William and Jane Smith, in the table annexed, the parties are equal in point of dignity; for they represent female stocks of the paternal line: but in regard to proximity, Cecilia Kempe, the mother of the father, is a nearer stock to the *propositus* than Christian Smith, the mother of the grandfather; and therefore her representatives shall succeed.

82. It will be apparent to every person, having thoroughly digested the above system, that it is applicable to any case that can be put on the subject of descent. The clearness and certainty of the common law on this head has been long since remarked by Lord Coke, in his preface to the second part of his Reports.—“In all my time I have not known two questions made of the right of descents by the common law; so certain and sure the rules thereof be.”

Observations
on Black-
stone's Doc-
trine of
Descent.

83. The chief point of difficulty that has occurred, has been owing to the want of due attention to the doctrine of representative proximity, which, as is justly observed by Lord Hale,—“through all the degrees of succession by the right of representation, the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood.” In the descending line this doctrine is sufficiently familiar and obvious; but in the ascending line it is not equally familiar, nor has it recently been duly explained. For although by the law of England the principle of representative proximity is equally applicable in the one line as in the other; yet in a table of descents affixed to a work of deservedly great celebrity, the doctrine has been rejected, and a different system has been adopted.

84. The work alluded to is that popular treatise, the Commentaries on the Laws of England by Sir William Blackstone, in which, after mature and repeated deliberation, he persisted in a system repugnant to the law of descents, as it had stood and continued in England for upwards of five centuries ; and had been successively expounded by Lord Hale, Lord Chief Baron Gilbert, and the ablest writers on the subject.

Now, as the Commentaries are justly supposed to contain the pure elements of the English law, and as the learned author has entered into an elaborate discussion of the question, it may be presumed that the rising generation will admit the validity of his reasons without further inquiry, and that his system will be generally adopted. But as we do not concur with the learned commentator, we deem it a mark of respect due to his reputation, to consider the reasons assigned by him in support of his opinion, and at the same time to state the authorities which have induced us to pursue a different course of preference in the table of descents annexed to this chapter.

85. The doctrine which gave rise to the discussion was stated from the bench by Mr. Justice Manwoode, in the case of *Clere v. Brook*, as reported by Plowden, 442. The question in that case was, whether the heir of the father's mother, or the heir of the mother, were the right heir to the son. The Court were unanimous for the former, on account of the dignity of blood of the paternal line.

Justice Manwoode having answered some objections to this decision, observed, that "where they (the competitors) are equally worthy in blood, then the nearest shall be preferred : as if the purchaser die without issue, and the brother of the purchaser's

father claim; and the brother of the purchaser's grandfather, that is to say, the brother of the father of the purchaser's father, also claims the land; and the brother of the purchaser's great grandfather, that is to say, on the part of the father in the lineal ascent of males, also claims the land; then the brother of the purchaser's father shall be preferred as heir, for he is nearest of the blood of the purchaser's father, and they are all equally worthy in blood, for they are all of the blood of the males, which is the more worthy sex, and therefore the nearest shall be preferred as heir. And if there is no such brother of the purchaser's father, nor any issue of such brother, nor any sister of the purchaser's father, nor any issue of her, (for the sister shall be in the same degree as the brother, where there is no brother); then the brother of the purchaser's grandfather, or his issue, or the sister of the purchaser's grandfather, or her issue, shall be preferred before the brother or sister of the purchaser's great grandfather, and their issues, and so on from them *in infinitum*. And so the brother or sister of the purchaser's grandmother, viz. the mother of the purchaser's father, shall be preferred before the brother or sister of the purchaser's great grandmother; viz. mother of the purchaser's father's father, because they are equally worthy in blood; for such heirs come from the blood of the female sex, from which the purchaser's father issued; and where they are equally worthy, the next of blood shall always be preferred as heir."

To this doctrine Mr. Justice Blackstone objects, and has declared his opinion, that the heir of the *besailes* or great grandmother on the part of the father, ought to be preferred to the heirs of the *ailles* or grandmother on the same side. Accordingly, in

the table of descents annexed to the second volume of the Commentaries, he hath preferred the former, whom he distinguishes by N° 10, to the latter, or N° 11, for the following reasons :

1st. " Because this point was not the principal question in the case of Clere and Brook, but the law concerning it is delivered *obiter* only, and in the course of argument by Justice Manwoode ; though afterwards said to be confirmed by the three other Justices in separate extrajudicial conferences with the reporter."

2d. " Because the Chief Justice Dyer, in reporting the resolution of the Court in what seems to be the same case (Dyer, 314.), takes no notice of this doctrine."

3d. " Because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with the position of Justice Manwoode."

4th. " Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents ; as is manifest by inspecting the table ; and destroys that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, beside the mere dignity of blood."

5th. " Because it introduces all that uncertainty and contradiction pointed out by an ingenious author, (Law of Inheritances, 2d ed. pp. 30. 38. 61. 62. 66.) and establishes a collateral doctrine incompatible with the principal point resolved in the case of Clere and Brook, viz. the preference of N° 11 to N° 14. And though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty ; it is apprehended that the difficulty may

be better cleared by rejecting the collateral doctrine, which was never yet resolved at all."

6th. "Because, by the reason that is given for this doctrine in Plowden, Bacon, and Hale, (viz. that, in any degree paramount, the first law respecteth proximity and not dignity of blood,) N° 18 ought also to be preferred to N° 16, which is contrary to the 8th rule laid down by Hale himself. (Hist. C. L. 247.)"

7th. "Because this position seems to contradict the allowed doctrine of Sir Edward Coke, (Co. Lit. 12.) who lays it down, under different names, that the blood of the Kempes (alias Sandies) shall not inherit, till the blood of the Stiles (alias Fairfields) fail. Now, the blood of the Stiles does certainly not fail, till both N° 9 and N° 10 are extinct. Wherefore N° 11, being the blood of the Kempes, ought not to inherit till then."

8th. "Because, in the case, M. 12 Edward IV. 14. (Fitz. Ab. tit. *Descent*, 2. Bro. Ab. tit. *Descent*, 38.) much relied on in that case of Clere and Brook, it is laid down as a rule, that *cestuy que doit inheriter al pere doit inheriter al fils*. And so Sir Matthew Hale says, (Hist. C. L. 243.) that though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been, had the father inherited. Now, it is settled by the resolution in Clere and Brook, that N° 10 should have inherited to Geoffrey Stiles the father before N° 11, and therefore N° 11 ought to be preferred in inheriting to John Stiles the son."

86. To these reasons full and satisfactory answers appear to us to have been given in a tract entitled, "Remarks on the laws of descents, and on the reasons

assigned by Mr. Justice Blackstone for rejecting, in his table of descent, a point of doctrine laid down in Plowden, Lord Bacon, and Hale,"—published in 1779.* And therefore the substance of those remarks shall, for the satisfaction of the student, be here stated.

87. On the first of Sir William Blackstone's reasons the author observes, "that the three introductory reasons are merely speculative; they are rather preliminary observations than arguments from principle; of course the remarks must be of the same nature. As nothing positive can be determined from either, the reader will judge which has the best grounds for presumption.

"It is admitted, that the present point was not the principal question in the case of Clere and Brook: however, as this doctrine was laid down by a Judge sitting in court, and delivered in his judicial capacity, some respect is due to his sentiments. And though it may not be allowed that the law, delivered *obiter* in the present case, was founded on the same substantial reasons which led to the final judgement; still he will not contend that, because it was delivered *obiter*, it was therefore less reasonable; or, because it was said to be confirmed by the three other justices, that it was not their opinion, or that it was a bad opinion."

On the second reason, he remarks, that "the report of Sir James Dyer is extremely short: for the Court were unanimous in their resolution. But, as he hath not given the distinct opinion at large of any of the Bench, even to the point Before them, can we

* By William Osgoode, Esq. of Lincoln's-Inn, afterwards Chief Justice of Lower Canada.

Pro Archia.

reasonably expect him to take notice of any collateral matter? If we wish to hear the arguments, Plowden hath reported them. If we are not satisfied, whither can we refer ourselves? May it not hitherto be said, *Est ridiculum ad ea quæ habemus nihil dicere, quærere quæ habere non possumus?* Thus stands the fact. Plowden gives a comprehensive report of the case, and the doctrine laid down, when the Court gave their opinion. Dyer reports the judgement with a brief state of the question, but takes no notice of this, nor any other doctrine. So far then the one is positive, the other neutral. Are we now to discredit the representations of the former, and conclude, from the silence of the latter, by an argument made up of incredulity and uncertainty, to reject the only testimony given, and extort evidence from a nullity? This were to support a cause in the most effectual manner. From Plowden it appears, that the Chief Justice was present when Manwoode delivered this as law. What, then, can we infer from his silence, except his consent?"

To the third he replies, that "the account, given by Plowden, is thus subjoined in a note to the report of the case. "Note, in the case before put, where the purchaser in fee dies without issue, and the brother of the grandmother on the part of the father claims the land as heir, and the brother of the great-grandmother also on the part of the father claims the land as heir, many were of opinion, because there was no nearer heir of the male line, the brother of the grandmother should not be preferred, as Justice Manwoode had said, but that the brother of the great-grandmother should be adjudged heir, for his blood is derived to the purchaser by two males, viz. by his father and grandfather; whereas the blood of the brother of the grandmother is derived to the purchaser

but by one male, and the grandfather was not of the blood of the brother of the grandmother, but he was of the blood of the brother of the great-grandmother, and therefore such blood is more worthy. And upon this I put the question again to Manwoode in the presence of Harper, another of the justices of the Common Bench, both of whom held clearly that the brother of the grandmother should be heir to the purchaser, and not the brother of the great-grandmother, because the former is nearer in blood to the purchaser on the part of his father; which proximity holds place on the part of females conjoined by marriage to males, when such blood is once derived by a male to the first purchaser. And another day I put the same question to Mounson, puisné judge of the same Bench, and he was of the same opinion with the other justices, for the same cause; and at another time afterwards, I put the same question to the Lord Dyer, who was of the same opinion also; so that all the justices of the Common Bench unanimously agreed in the same case, that the brother of the purchaser's grandmother on the part of the father, should be preferred before the brother of the purchaser's great grandmother on the part of the father."

Thus the same report, which tells us that many held a different opinion, tells us likewise, that this position of Justice Manwoode was confirmed by Justice Harper, Justice Mounson, and Lord Chief Justice Dyer. Therefore, when Lord Bacon and Hale adopted this position, they had the unanimous authority of the Bench to support it: when the author of the Commentaries disallowed this position, he was justified by the scruples of many bye-standers to reject it. It re-

mains to be inquired, who has been guided by the most sufficient reasons. The authority must surely preponderate with us.

On the fourth reason he observes, that "it may be a matter of surprise, that the first pointed argument against Justice Manwoode's position should be brought from a topic, so irrelative as that of symmetry: for law is the object of reason, not the subject of delineation. The laws of descent are regulated by the analogy of their principles, not by the symmetry of a table; and, when a system of inheritance is established, little attention is paid to the appearance it may make in a scheme of genealogy. Being therefore confident, and meaning to prove, that our doctrine is founded upon legal principles, we are not careful in the first instance for the subordinate concern of symmetry. And in this spirit, admitting for a moment that our position destroys the regularity of the table, we mean to defend it on the strong ground of consistency. For, if we cannot unite both qualities; if a sacrifice must be made; which shall we surrender?—the congruity of our principles, or the symmetry of their delineation? If the eye be offended by irregularity; to avoid this, shall we disgust the mind by incongruity? Can we hesitate which to give up, the reality or the representation, the substance or the shadow? Those remarks might be made, if the learned author meant to apply the absolute idea of symmetry, and to require the same in the draught of a course of descent. But it may be urged, he hath guarded against the pertness of such interrogatories, by specifying the symmetry of the legal course of descents, which must be relative. In such case, before we can confess, deny, or retort the charge, we

must acquaint ourselves with the nature of the thing destroyed ; and in what manner it is connected with the subject."

"The legal course of descent is chalked out by the laws of inheritance: the symmetry of which course arises from a due exemplification of those laws, agreeably to the principles thereof. And it is constituted by, and can only exist so long as the course of descents conforms itself to, the legal principles of inheritance. The idea of symmetry is conceived, and regulated by such conformity, in which sense it is altogether relative. In short, the entire and regular symmetry of the legal course of descents, is nothing more than that order, which is observable in a praxis of those principles, whereby the course is directed.

"Thus, the legal symmetry of the table will finally resolve itself into a conformity to the principles of descent, to which an appeal is more direct than to the medium of delineation. For if, by any position, one of the principles of descent is violated ; by the same will this symmetry be also destroyed."

"Let us then compare the position of Manwoode with the principles above stated ; and we shall discover whether the charge contained in this fourth reason be well founded."

"The doctrine laid down by Manwoode is, that where all the branches or descendants of the male stock are extinct, the brother or sister of the mother of the purchaser's father, or N^o 11, shall inherit and be preferred before the brother or sister of the purchaser's great grandmother, or N^o 10, for whom Mr. Justice Blackstone contends."

"First, in point of dignity of blood, the claimants are equal, they represent female stocks of the pater-

nal line; therefore, upon that ground merely, the one cannot be preferred to the other; but,

“Secondly, in point of proximity, it is obvious that the grandmother, or N° 11, is nearer to the person last seised than the great grandmother, or N° 10; on which account the representatives of the former are preferred by Justice Manwoode.”

“It follows then, that this position, being supported by the principles of inheritance, cannot destroy that regular symmetry, which arises from a conformity to those very principles.

“On the contrary, let a person, having a distinct and perfect conception of the several classes of dignity, with the notion of proximity superadded, view the table; he will trace from the *propositus*, and expect that, when one class is exhausted, the number denoting immediate preference will be affixed to the nearest claimant of the ensuing class. For instance, in the male stock of the paternal line ascending, he will find the inheritance regularly given to the nearest representative, first to the uncles and aunts, or N° 7, then to the great-uncles and aunts, or N° 8, and so on, till the class is exhaust; but when he comes to the second class, or female stocks of the paternal line, he will revolt at the preference given to the more remote from the *propositus*, and contend that the legal course of descents is destroyed in that instance; and that the violation thereof is increased by the contrast with the maternal line, where due regard is paid to proximity, and the regular order preserved.”

“The second clause of this fourth reason contains a charge, which reduces us to the necessity of inquiring whether the matter be rightly understood between

us? Whether we are agreed upon terms? Otherwise, in what manner can this position "destroy the constant preference of male stocks," when, by the question, they and their descendants are extinct? For were there any male stocks, or their representatives surviving, they would certainly succeed; and there would be no contest between the present competitors. If N° 11 be appointed immediately after N° 9, it will certainly destroy the preference of N° 10: but, does N° 10, being the representative of Christian Smith, represent a male stock? In fact, what possible pretensions can either of the claimants have? That both are of the paternal line is granted; but it is evident that the brothers and sisters of Cecilia Kempe and Christian Smith, are the representatives of female stocks; and, be the preference given to either, surely the "preference of the male stocks" cannot be destroyed thereby: for, as the question is fairly stated by a learned Chief Baron, *Gilb. Ten.* 19. "the blood of the father's mother was preferred to the blood of his grandmother, being *both female bloods*; and both coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote."

"But, if it be contended, that the blood of Christian Smith may be traced through the male stocks of the paternal line, it is granted. But may not the blood of Cecilia Kempe, be traced through a male stock to the *propositus* likewise? And, as Harper says, "proximity holds place on the part of females *Plowd.* 450 conjoined by marriage to males, when such blood is *once* derived by a male to the first purchaser." And such connexion with the paternal line is the avowed reason of the preference. *Le frere le ailes sera heir al purchasour, et nemy le frere le besailes, pur ceo*

que il est plus prochain en sanke al purchasour del part de sa pere. The laws of England do certainly prefer the descendants from the male and female stocks of the paternal line; and, should any system overlook this distinction, it would be no difficult matter to controvert it. But, in the present case, we have nothing to apprehend from that objection, nor “from
 2 Comm. 228. the additional reason before given; for what is it? the argument of probability, the reasonable proof required by the law, that the claimant be *next* of the whole blood to the person *last* in possession, (or derived from the same couple of ancestors,) which will probably answer the same end, as if he could trace his pedigree in a direct line from the first purchaser.” Now, who are the next couple of ancestors who have issue, and in whose favour the argument of probability ought to weigh? The answer is, Luke and Francis Kempe; from whom the person last in possession, and N° 11, are both lineally descended. Nevertheless, the author of the Commentaries contends for the issue of William and Jane Smith, a more remote couple of ancestors; not re-
 2 Comm. 231. collecting his observation, that “the higher the common stock is removed, the more will even the probability decrease.”

On the fifth reason he remarks, that “when the reader shall be made acquainted with the nature of these uncertainties and contradictions, it will be a matter of surprise, that a learned man should suggest them; and of still greater surprise, that a really learned man should repeat them. In the first place, it will be manifest, by consulting the work of the ingenious author quoted, that the charge of all those uncertainties and contradictions is brought against the first grand principle of the laws of inheritance;

and therefore this charge, even if it were valid, is not to be pointed against any particular application of the principle, but against its general application. Hence it is equally to be brought against Justice Blackstone's position, as against that of Manwoode."

"The charge is this: — "Here I would raise a *quere* or *dubitatur*, whether the descendants from the collateral ancestors of the *several* classes, (or N° 10, 11, 12, 13,) are inheritable or not, before the mother's brother (or N° 14.) And, in my opinion, the doctrine seems, either way, chargeable with some repugnance: for, on the one hand, if they are to be preferred to the mother's brother (as I conceive the law is), then it directly impugns and impeaches the rule, which gives the inheritance *ratione proximitatis* to the brother or sisters of the paternal grandmother, (or N° 11,) in preference to the brothers or sisters of the maternal aunt of the grandfather, (or N° 10,) on this foundation as it is alleged; because *proxima non remota causa in jure spectatur*: and, if the descendants from the collateral ancestors are not to be preferred to the mother's brother, but to be totally excluded, this would be absurd; forasmuch as then the paternal uncles and aunts of the mother and the grandmother of the paternal line should not be capable of inheriting; when the descendants from the brothers and sisters of the remotest feme, in the direct line, are held to be inheritable."—That is to say, it is inconsistent that the principle of proximity shall take place between the claimants N° 10, 11, 12, 13, and not between them and N° 14, which represents the mother's brother, and is certainly nearer than any of the classes above mentioned. Now the reader sees, that for want of a discretive judgement, to discover that the said several classes of collateral

ancestors, though more remote than N° 14, yet they are of the paternal line; the ingenious author cited has perplexed the question by applying the test of proximity between them and the mother's brother, who is of the maternal line, and consequently shall not inherit till the paternal line be exhausted: whereas that test should never be applied, but where the parties are equal in point of dignity. Let it be further observed, that this charge, futile as it is, is not brought particularly against N° 11, the class for which we contend, but against the *several classes* represented by N° 10, 11, 12, 13. It is not brought specifically against Justice Manwoode's position, as this fifth reason would insinuate, but against "the descendants of the collateral ancestors of the higher classes;" among others comprehending N° 10, the class for which Mr. Justice Blackstone contends. Does it not then argue a great degree of partiality, when a general objection is brought (good or bad, no matter), not to regard our own case, but to enforce it against another, which, by confession, is in the same predicament? yet the author of the Commentaries, whose own position, as favouring the more remote claimant, is most obnoxious to this censure, disregarding his own situation hath brought the whole weight of the charge on the devoted system of Manwoode.

"If we may avail ourselves of the opinion of this author, where he simply informs us what the law is, (not what it ought to be,) we shall find that he concurs with Justice Manwoode, and all the elder writers. He puts the case at present in question, and decides it thus: "If the male stock of the paternal line is totally extinct at the death of the purchaser, then the inheritance will devolve on the heirs of the *father's mother*, or N° 11; and, when they

are extinct before entry, then it goes to the heirs of the grandfather's mother," or N^o 10. Again, he justly censures the reason given in defence of J. Blackstone's opinion, that *more* of the purchaser's male ancestors have been descended from and born of the females in the higher classes. "If this argument must be allowed to have any force at all, it proves too much; and will conclude, if it concludes any thing, for the highest class," or the representatives of Ann Godfrey.

Law of Int.
30. 61.

"So far, then, the charges of uncertainty and contradiction, though groundless, were not pointed by the learned writer against one system more than the other. His deliberate opinion supports our argument, and is directly contrary to that of Mr. Justice Blackstone.

"Again, this position is charged with "establishing a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brook." If the nature of this collateral doctrine had been precisely stated, it would have been more satisfactory; as then we might have gone immediately to the point. At present we will state the only part of the case which carries (as we conceive) the least appearance of incompatibility.

"The circumstance that would most strike a person unacquainted with the principles of descent, is, that in the case mentioned, the more remote claimant was preferred; whereas at present we contend for proximity. He is answered, in that case the more remote claimant was the more worthy in blood, which shall always supersede proximity; but, in the present case, they are equal in respect of dignity of blood, in which situation we can only resort to proximity. We do not mean to insult the learned Judge,

by proposing this as an objection on his part ; it is unworthy of him ; and we have only to lament, that the nature of the charge is such, that we can only make a general defence, by pleading not guilty. To establish this incompatibility, it should be proved that N° 10 is more worthy than N° 11 : this hath not been attempted. Therefore if the reputation of the Commentator did not prevent us from making hasty conclusions, we should be well justified in treating this charge as a violent assumption.

“ On our part, it will be sufficient to show, that the point settled and the point contended for, do both conform to the principles already stated. In the first instance, the claimant took on account of dignity of blood : in the second, that principle did not operate. N° 11 ought therefore to take on account of proximity. We shall not enter further into the detail, as the reader can easily apply both cases to the same system. It will not then readily appear, in what manner this position can establish a doctrine incompatible with the point settled.

“ Till a more direct charge be brought, this, we hope, will be a sufficient vindication ; and now we are upon the subject, we retort the accusation. We say, that in the table of descent, the preference given in the paternal line is incompatible with the preference given in the maternal line. And as we disapprove of general charges in our own case, it is fitting that the objections we bring should be particular.

“ In the paternal line, Cecilia Kempe and Christian Smith are female stocks ; and the representatives of the latter, though more remote from the person last seised, are preferred to the former for this reason, because their blood is derived to the person last seised by two males.

“ In the maternal line, Hannah Willis and Susan Bates stand in the same point of relation with the two above named, the difference of line excepted ; and though the representatives of Susan Bates derive their blood from the person last seised by two males, and are precisely in the same predicament with those of Christian Smith, with respect to blood, still they are not preferred in the maternal line ; which is incompatible.

“ The fact is, that, in the maternal line, the table of descent is properly delineated : the principles of dignity and proximity are invariably pursued throughout : in the paternal line, they are not. No wonder, therefore, that they are incompatible.”

To the sixth reason he replies—“ It is admitted that Lord Bacon expresses himself in these direct terms : “ *In any degree paramount the first, the law respecteth proximity, and not dignity of blood.*” But, after a tedious search, we could find no such terms nor doctrine in Plowden. Perhaps it would be a difficult matter to point it out ; though, to discover the opinion really delivered on the occasion, we have only to refer to pa. 449, where we find in what express terms a doctrine is laid down, altogether contrary to that stated in the reason. “ If one claim from the father’s mother, and another claim from the great grandfather direct, the latter shall be preferred ; *et uncore l’autre est plus prochain del sanke, mes est meins digne de sanke.*” Plowd. 449.

“ Likewise, after a diligent search, we could find no such doctrine in Hale ; and, till we are referred to the doctrine we cannot find, we must content ourselves with such information as we can find. His first rule is this : “ The law prefers the worthiest of blood: those of the male line shall be preferred *usque infinitum.*” Hale Hist. C. L. 271.

Again, if the great great great grandfather, or the great great great grandmother of the father has a brother or sister, she shall be preferred, and exclude the mother's brother, *though he is much nearer.*"

" Thus, though from the nature of the thing we cannot strictly prove that no such doctrine appears in Plowden nor in Hale, still we have brought the best possible proof from their own words ; whereby it is evident they put forth doctrines directly contrary to those suggested. For more satisfactory evidence, we refer the readers to their respective works, which, contrary to the laudable precision our author usually adopts, he hath cited at large without any particular reference. Though we much suspect that their researches on this head will, like our own, be fruitless."

If, then, it be allowed, that these opinions do not in anywise appear, it is impossible they should appear as the reasons given for any particular doctrine. But if the avowed reasons of the doctrine we support be required, Plowden's have been stated. Sir Matthew Hale says, " and though it be also true, that the great grandmother's blood has passed through *more males* of the father's blood than the blood of the grandmother or mother of the father ; yet, in this case, the father's mother's sister shall be preferred before the father's grandmother's brother, because they are all in the female line, viz. *cognati*, and not *agnati* ; and the father's mother's sister is nearest, and therefore shall have the preference as well as in the male line ascending, the father's brother or his sister shall be preferred before the grandfather's brother."

" With respect to Lord Bacon's position, we shall simply observe, that, as it is totally repugnant to the spirit of those laws, whence the doctrine of descent

originates, so it has been contradicted by every writer on the subject, and is therefore inadmissible. When we recollect the obligations in general science, that are due to this sublime and penetrating genius, let not this mistake be remembered; when our admiration leads us to consider him as some superior being, even this error may convince us that he was human.

“ Upon the whole, then, it appears that Lord Bacon mistook the reason of this doctrine entirely; and the author of the Commentaries, observing the error, hath unwittingly imputed the same to Plowden and Hale; which, being a refutable position, is brought to create an inconsistency in Hale’s doctrine. Whereas, the perfection of his system will thereby more forcibly appear, inasmuch as nothing irregular can possibly square with it. How far the multiplicity of learning, our author was obliged to consult, may have occasioned this mistake, we know not; but are assured that, however his system may be continued, he will not suffer imputed opinions to remain on record against those respectable characters, so contrary to their professed sentiments, and which reduce them to an absurdity.”

On the seventh, he observes, that “ it is an incontrovertible point; that the blood of the Kempes shall not inherit, till that of the Stiles fail. There is likewise no question, whether it fails at N° 9, which bears the name of Stiles. But the case is not altogether so obvious with respect to N° 10, notwithstanding that these two numbers are coupled together, as if one and the same reason made them similar instances. For, on examination, it will be found, that the name, to which that number is affixed, is Smith. However, on tracing upwards, we shall find that, some generations back, the great grandfather of John

Stiles married a certain Christian Smith; who is supposed to have representatives still living. We must therefore admit, that a portion of the blood of the person last seised may be traced to N° 10, or the said Christian Smith, as to a female stock of the paternal line, and not, as seems by the reason to be insinuated, as if it were of a degree to be mentioned in point of dignity with N° 9.

“ It is then admitted, that the blood of John Stiles does not fail, while N° 10 exists.

“ But it will likewise be found, that George Stiles the grandfather married Cecilia Kempe. Now, according to Sir Edward Coke, “ the father hath two immediate bloods in him, the blood of his father and the blood of his mother, (or Cecilia Kempe), and both these bloods are of the part of the father.”

And, by consulting the table of ancestors in the Commentaries, B. 2. c. 14. it will appear, that the Smiths contribute one-eighth, and the Kempes one-fourth, of the blood of the person last seised; or, to adopt the expression of the ingenious author lately cited, “ the grandmother furnishes a double portion of consanguinity, to what the great grandmother does.” It is then evident, that, as the blood of John Stiles does not fail, while N° 10 exists, so, neither, does it fail, while any of the representatives of the grandmother, or N° 11, exist.

“ Since this is necessarily the case, how shall we account for the distinction so visible in the text, where the name of Smith is omitted, and the number representing it is found in such worshipful society; whereas great care is taken to inform us, that N° 11, though representing a much nearer relation, is of the blood of the Kempes, and therefore to be postponed?

“ This question we do not undertake to solve.

“ But having discovered, what was unobserved in the present reason, that when the name of Stiles is no more, still the blood of the paternal line flows in two channels, are we to admit the conclusion which appears so deliberate; or are we to advance the neglected N° 11, whose title previously presents itself upon a regular tracing, and in many other respects appears to be so justifiable?

“ If we advert to our author’s own computation so lately mentioned, we shall perceive that the relation, between N° 11 and the person last seised, is much nearer than the relation between N° 10 and the person last seised. However, we shall avail ourselves no farther of this observation, than to presume it is very fair ground, whereon to produce at least the simple claim of N° 11: the right may be discussed afterwards.

“ The case of the claimants is such as hath been already stated: we will apply to a decision from which there will be no appeal.

“ The reader is desired to cast his eye on the table of descents, and to mark in what degree the two competitors stand. The rule to guide his judgment is thus laid down by the author of the Commentaries.

“ In order to ascertain the collateral heir of John Stiles, it is, in the first place, necessary to recur to his ancestors in the first degree; on default of which, we must ascend one step higher, to the ancestors in the second degree; then to those of the third and fourth; and so upwards *in infinitum*, till some ancestors be found, who have other issue descending from them beside the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent;” as the question is now concerning the collateral heir. In obedience to this

rule, let us recur to the first degree ; ancestors there are none living ; to the second, by the question they are extinct. In the third, we find N° 11, or the representatives of the paternal grandmother. If, for the sake of speculation, we pursue our inquiries, we may find collateral ancestors in the fourth degree, or N° 10 ; but the inheritance is previously vested, it is cast on N° 11. Again, in the Commentaries, we find 2 Comm.223. this direction : “ In order to keep the state of John Stiles as nearly as possible in the line of his purchasing ancestors, it must descend to *the nearest couple of ancestors*, that have left descendants behind them.” Those ancestors, who have left descendants, are Luke Kempe and Frances Holland, and William Smith and Jane King. Can it now remain a doubt which is the nearest couple, or whose issue shall succeed ?

“ Such being the case, we cannot possibly admit of the conclusion, “ that N° 11, being the blood of the Kempes, ought not to inherit till N° 10 is extinct.” For, to retort the distinction so invidiously made in this seventh reason, N° 10 represents the blood of the Smiths, and is not descended from so near a couple of ancestors as N° 11, and therefore we are authorized to inquire, why has not their issue the same degree of preference in the table, that we are taught to give them by the text ?

“ With regard to the eighth, he remarks, that “ this reason has a most formidable appearance. The approaches are perfectly regular. Two authorities are brought to establish a point of doctrine ; which point is applied to a case resolved, and the inference seems fatal to our system. To make a regular defence, it is our duty to examine, whether the authorities and acknowledged maxims of descent do support such a doctrine ; then, whether it is well applied to the case

resolved; and whether such inference follows of necessity.

“ The first authority is from the Year Book, Mich. 12 Edw. IV. 12. The case, in which the rule was originally introduced, is thus stated. “ Where a man purchases land, and dies without issue, and without heir on the part of his father, his next heir on the part of his mother shall have the land. And, if a man purchase land, and hath issue and dies, and the issue enters and dies without issue, and without heir on the part of his father, that is to say, on the part of the father’s male ancestors, that, in such case, the heir on the part of the mother of his father, that is to say, of his paternal grandmother, ought to inherit: *for he, who ought to inherit the father, ought to inherit the son.* Catesby moved, that where the issue was once seised, that the descent was cast in the blood of the father; therefore it shall never resort to the blood of the father’s mother, &c.; no more than where a man purchases lands, and dies without issue, where, if the land descends to the heir of the father on account of the dignity of blood, who is seised and afterwards dies without issue, and without heir, then the blood on the part of the mother ought not to inherit: for it is different blood. To which it was answered, that the cases are by no means similar: for, when the inheritance descends to collateral blood, it shall not resort to other blood, &c. But it was held, that if a man purchase land and has issue, who takes the land by descent, and afterwards the issue dies without issue, and without heir on the part of the father, that the heir on the part of the son’s mother ought not to inherit; for he is not of the blood of the first purchaser, that is, he is not of the blood of the father: but the heir of the son,

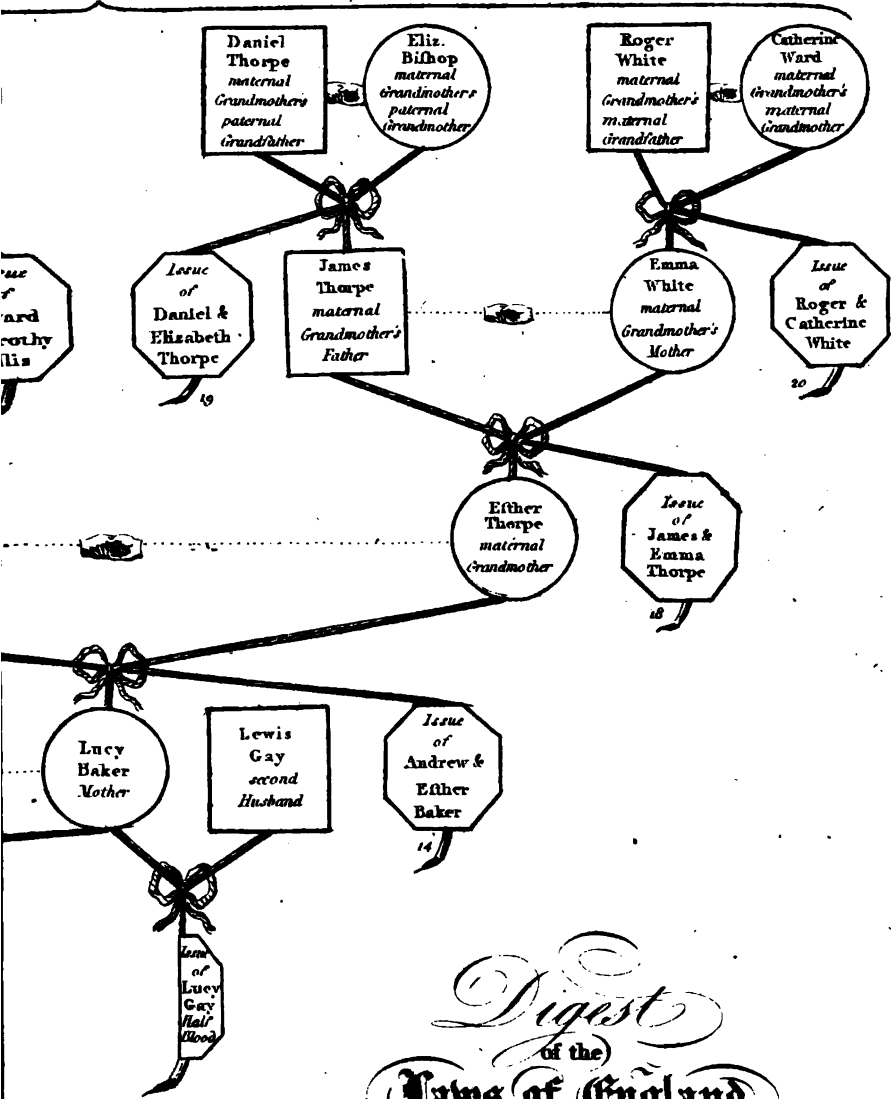
on the part of *ailles*, that is, of the mother of the father, ought to inherit, &c. *quod nota.*"

"Such is the first authority; and before we make any remarks on the manner in which it is applied, we must express our surprise, that an argument should be drawn from a case, that we might justly cite in support of our own system. For, the question between Manwoode and Justice Blackstone is this; when are the representatives of the male stock of the paternal line extinct, who shall succeed? The former says the heir of the *ailles*; the latter, the heir of the *besailes*: but, what is most singular, to support his argument, an authority is brought, which upon the same question gives the succession to the *ailles*: "The heir of the son, on the part of the *ailles*, ought to inherit."

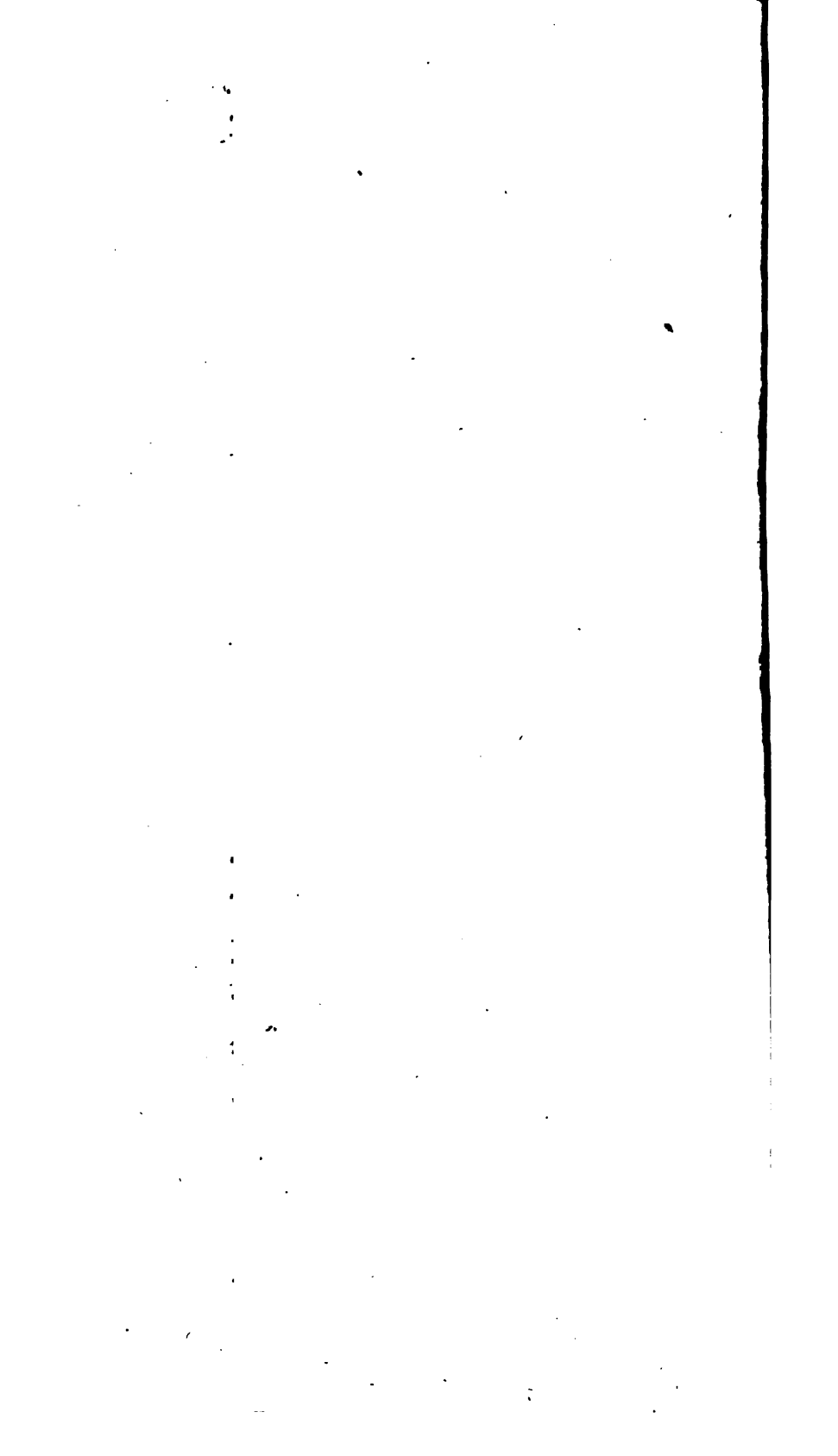
"The next authority to support the point of doctrine is a quotation from Sir Matthew Hale. We shall take the liberty of making a larger extract, than by the context the reader may comprehend the full scope of his meaning.

"If the son purchases land in fee simple and dies without issue, those of the male line ascending, *usque ad infinitum*, shall be preferred in the descent according to their proximity of degree to the son. And therefore the father's brothers and sisters, and their descendants, shall be preferred before the brother of the grandfather and their descendants; and if the father had no brothers nor sisters, the grandfather's brothers and their descendants, and, for want of brothers, his sisters and their descendants, shall be preferred before the brother of the great grandfather; for although, by the law of England, the *father grandfather* cannot immediately inherit to the son, yet the direction of the descent to the collateral ascendi

ERNAL LINE



Digest
of the
Laws of England,
respecting
Real Property,
BY
(W^m CRUISE,
of Lincoln's Inn Esq^r Barrister at Law.)



line, is as much as if the father and grandfather had been by law inheritable, and should have inherited to the son before the grandfather, and the grandfather before the great-grandfather; and consequently if the father had inherited and died without issue, his eldest brother and his descendants should have inherited, before the younger brother and his descendants; and, if he had no brothers but sisters, the sisters and their descendants should have inherited before his uncles, or the grandfather's brothers and their descendants; so, though the law of England excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited, viz. it lets in those first, that are in the next degree to him."

"Such is the second authority; and it is presumed the reader will be of opinion, that by this detail the learned Chief Justice meant to exemplify the doctrine of proximity by its several degrees; and to inform us, that though the father, grandfather, and great-grandfather cannot immediately inherit, still we must resort to them as to the stocks whence we are to trace proximity and primogeniture. And to this rule he hath referred the matter at present in question, which he hath stated and decided in the following terms.

"When the son is once seised, and dies without issue, his grandmother's brother (or N^o 11.) is to him heir of the part of his father; and, being nearer than his great-grandmother's brother, is preferred in the descent." An opinion, so clear and decisive on the question itself, will allow us to pay little regard to the construction put on a detached sentence from the same authority, in order to support a contrary argument. And here we must observe, that though it be allowable, where an author involves himself in

contradictions, to oppose one part of his doctrine to another; still it is to the last degree uncandid, when he is consistent, to force a distinct assertion into the service of an argument that he disavows.

“ Upon the whole, we think the citation from Hale a very full comment on the *dictum* advanced in the Year Book. And that the learned author so understood the same, is obvious from the following passage: “ Now, here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks, from which the next successor must spring.”

2 Comm. 226.

“ Thus then we admit both authorities; but, what is most material, we see on what occasion and to what intent they were originally laid down. When therefore they shall be cited to establish a future argument, we shall know how far their influence extends; and, knowing to whom the inheritance was given, we may judge with what propriety a reference is made thereto. But, if these very authorities be advanced for the purpose of giving the inheritance to another, what shall be then said? Shall we not ask, is it candid to adopt a rule and to apply it so as to produce a consequence, totally different from the original conclusion? For it is evident, that the purpose of introducing these authorities was, to collect an inference or point of doctrine therefrom, which, though not delivered in express terms, is nevertheless made and adopted. To have stated it openly would have alarmed the reader; but the doctrine insinuated is, that on account of the rule *cestuy que doit inheriter al pere doit inheriter al fils*, in searching for the heir of the son, we ought to trace from the father, as from the *propositus*. Re-

ference is then made to the case of Clere and Brook, for reasons that we shall presently discover. However, in the first place, it is presumed no such doctrine can be gathered from the authors cited; and we have now to examine whether, if it be a point, it is consistent with the laws of descent.

“ First, that the learned Commentator, in a former instance, put a much more liberal construction on the *dictum* in the Year Book, may be gathered from the following passage.

“ This, then, is the great and general principle, ^{2 Comm.223.} upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended: according to the rule laid down in the Year Book, Fitzherbert, Brook, and Hale, that he, who would have been heir to the father of the deceased” (*and of course to the mother or any other purchasing ancestor*) “ shall also be heir to the son.” Now, if any one chose to adopt the passage contained in the above parenthesis, in the same manner as the *dictum* in the Year Book is, in the present case, applied to make the father become the *propositus*; it might thereby be proved, that as he, who would have been heir to the mother, shall also be heir to the son, so therefore the mother ought to become the *persona proposita*.

“ Secondly, in contradiction to this doctrine is the approved maxim, *Seisina facit stipitem*; and, “ as the ^{2 Comm.209.} seisin of any person makes him the root or stock, from which all future inheritance by right of blood must be derived,” on the authority of the Commen- Id. 228.

taries, which also tell us that "the law only requires that the claimant be *next* of the whole blood to the person *last* in possession," we conclude that the son being the person last seised, he shall be the root or stock from which such inheritance must be derived.

"Thirdly, if we are to trace from the father, it will introduce universal confusion; it will confound the distinction made by Sir Edward Coke, "that the father hath two bloods in him, by which means the father's mother, though of the female line to him, is of the male line to the son." For, if we are to trace from the father, his mother must be of the female line to the son; and, what is still more injurious, in such case the whole maternal line will be totally excluded, for there is no privity of blood between the father and the line of the mother.

"Thus have we endeavoured to prove, that no such point has been nor can be established. We now contend, that the case to which it is applied, the resolution in Clere and Brook, is indirectly stated. It was there settled, that the heir of Dorothy Young, the paternal grandmother of the person last seised, should succeed in preference to Edward Clere his mother's brother; that is, N° 11 shall succeed to John Stiles the son. Whereas we are told in the Commentaries, who might or *should* have succeeded to Geoffrey Stiles the father. That N° 10 should have inherited to Geoffrey Stiles the father before N° 11. This may be true, if John Stiles the son had never been seised; but, the contrary being the case, there was no question who should have inherited the father. The matter settled was, that N° 11 should inherit the son. This indirect stating of the case leads us to the reason why the point above mentioned was attempted

to be established. It was introduced with a view to discard the son ; and that the father should become the *propositus* or *root*, to whom N° 10 is exactly in the same relation as N° 11 is to the son. Now, can there be a more presumptive proof how far the judgment is here sacrificed, than the forced construction put upon different texts in order to establish a point for the purpose of getting rid of the son ? For, when once that is effected, when once we trace from the father, N° 10 will certainly inherit. But, as the fact is otherwise, as the son is the person last seised, shall not N° 11 confessedly succeed ?

“ The negative application of the rule is this : Because the issue of Luke and Frances Kempe, or N° 11, should not have inherited to the father, *therefore* they shall not inherit to the son. Now it is certain, that not one person of those represented in the table of descents, from N° 14 to N° 20 inclusive, shall ever inherit the father ; but who will be found to contend, that therefore not one of them shall inherit the son ?

“ However, by virtue of this liberal rule, John Stiles is utterly excluded, as though he had never existed ; notwithstanding we are told by the author himself that John Stiles held the land as a feud of indefinite antiquity. Let us then for a moment admit of the delusion, and refer ourselves to Geoffrey Stiles the father. Now, if the heirs of Christian Smith shall inherit John Stiles, as by the table they do, by parity of reason, must not the heir of Ann Godfrey succeed to Geoffrey Stiles ? To hesitate were useless ; their respective relation is the same ; if the heirs of the great-grandmother shall succeed in one instance, they shall in another, or there is no virtue in consistency. Nevertheless, having once secured Geoffrey Stiles as

the *propositus*, the system of the table of descents is deserted ; and appeal is made to the resolution in Clere and Brook : so that, when Justice Manwoode argues rightly from the son, the doctrine is reprehensible ; whereas no scruple is made, in tracing from the father, to admit the same arguments.

“ To pursue the proposed plan of defence, we should continue to examine whether such inference follows, as is suggested from the stating of the case resolved. But we are prevented by the express prohibition of our author : who, perhaps not thinking he should ever adopt a contrary opinion, hath in effect told the student, that if any case be put except as from John Stiles, he should not admit it.

2Comm. 240. The words are,—“ The student should bear in mind that, during this whole process, John Stiles is supposed to have been last actually seised of the estate ; for, if ever it comes to vest in *any other person* as heir to John Stiles, a new order of succession must be observed upon the death of such heir ; since he, by his own seisin, now becomes an ancestor or *stipes*, and must be put in the place of John Stiles.”

“ Had we previously attended to this admonition, we should have found that our arguments against the appointment of George Stiles the father, as the *stipes*, were needless ; for in such case a new order of succession must be observed, and the student is forewarned accordingly. Can we therefore, with any propriety, pursue our inquiries respecting the inference, when we are forbidden to admit the proposition ?

“ Upon the whole, we presume to have shown, that of the foregoing reasons, the first, second, and third, are merely speculative ; the fourth is drawn from an inapplicable medium, and a charge which is contra-

dicted by the express words of Plowden ; the fifth depends upon a distorted authority, and violent assumption ; the sixth on a misquotation ; that the seventh involves a contradiction between the table and the text ; and of the eighth it will not be deemed intemperate to say, that it collects a point of doctrine from authorities by which that doctrine is opposed, which point is applied to a case we are directed not to allow, and from which an inference is drawn, though we are enjoined not to admit of the premises.”*

* A case exactly in point, arose on the Midland Circuit in 1805, and was intended to have been argued in Westminster Hall, but was compromised. Several eminent counsel were however consulted, among whom was the late Mr. Serjeant Williams ; and they were all of opinion that Sir W. Blackstone's doctrine was wrong.

TITLE XXIX.

DESCENT.

CHAP. IV.

Of the Descent of Estates in Remainder and Reversion

- | | |
|---|---|
| 2. <i>Remainders, &c. descend to the Heirs of the Person in whom they first vested.</i> | 6. <i>A Right to a Remainder, &c. descends to the half Blood.</i>
16. <i>An Act of Ownership operates as a Seisin.</i> |
|---|---|

SECTION 1.

THE rules laid down in the preceding chapter respecting the descent of estates in possession, do not apply to the descent of estates in remainder and reversion, expectant on an estate of freehold. Because where there is a preceding estate of freehold, the actual seisin is in the possessor of that estate, not in the person entitled to the estate in remainder or reversion.

Remainders, &c. descend to the Heirs of the Person in whom they first vested.

2. It follows from this principle, that where a person entitled to an estate in remainder or reversion, expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir; because he never had a seisin to render him the stock or root of an inheritance: but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it comes into possession.

3. Thus it was laid down by the Court of K. B., in 34 Eliz. that “Of a reversion or remainder expectant on an estate for life, or in tail, there he who claims the reversion as heir, ought to make himself heir to him who made the gift or lease; if the reversion or remainder descend from him: or if a man purchase such reversion or remainder, he who claims as heir ought to make himself heir to the first purchaser.”

Ratcliffe's
Case,
3 Rep. 42 a.

1 Inst. 14 a.
n. 6.

4. In the case of *Kellow v. Rowden* it was held by all the Judges, that where an estate for life or in tail is created, and the reversion in fee expectant thereon, descends from the donor or settlor, through several intermediate heirs, before it falls into possession; every person claiming it by descent must make himself heir to the donor or settlor, and take it as such: and not as heir to the intermediate heirs, who need not be so much as named in an action brought against the person so acquiring the possession, as heir to the donor or settlor. For the intermediate heirs never had such a seisin as to transmit the reversion from them, by descent, to any person who was not heir to the donor or settlor.

Tit. 17. § 28.

5. D. Smith, in consideration of his marriage with Sarah Madey, in 1716, settled the premises in question to the use of himself and the said Sarah, during their natural lives, and the life of the survivor of them, remainder to the heirs of the body of the said Sarah by the said David; remainder to the said David, his heirs and assigns for ever. There was issue of the marriage one daughter, named Elizabeth, and no other child. Upon the death of the said Sarah, David Smith married a second wife, and by her had issue, Ann, the lessor of the plaintiff, and no other child. Elizabeth the daughter of the said David by Sarah his first wife, intermarried with John

Jenkins v.
Prichard,
2 Wils. 45.

Waters, and upon that marriage, David Smith delivered up the possession of the premises to John Waters, but did not execute any conveyance thereof to him. In 1738 David Smith died, leaving issue only Elizabeth by his first wife, and Ann by his second wife; and about twelve months after, Elizabeth died, leaving issue one son, who was born after the death of David his grandfather, and died an infant, soon after the death of his mother. The said David Smith had no brother, but left a sister named Jane (married to one Gilbert) who was heir at law to Elizabeth the daughter of David Smith, by his first wife, and to her son; and upon the death of John Waters, Gilbert and his wife entered on the premises. Ann, the daughter of David Smith by his second wife, claimed the estate, as heir at law to her father, and brought an ejectment against Gilbert and his wife.

2d edit. 143.
note (g). Serjeant Wilson reports the Court to have been of opinion that Ann had no title to the premises. But it is truly observed by Mr. Watkins, in his Essay on the Law of Descents, that the judgement is evidently misstated, or wrongly printed; that in a note of this case taken by Mr. Serjeant Hewit, afterwards Lord Chancellor of Ireland, the adjudication is thus given: —“ In this case it was clearly agreed, that by the settlement of 1716, David Smith was tenant for life, his wife was tenant in tail, with the reversion in David Smith: and thereupon this point was made, whether the reversion in fee descended upon the two daughters of David; viz. Elizabeth by his first wife, and Ann by his second wife, in such manner as that upon the determination of the estate tail which descended upon Elizabeth, and from her upon her son, and expired by his death without issue, it should go in

moieties; viz. one moiety to Ann, and the other to the heirs of Elizabeth; or whether it should not go all to Ann as heir to her father, who was last actually seised of the reversion."

The Judges were of opinion, "that though the reversion descended upon the two daughters of David on his death, yet they were not actually seised of that reversion during the continuance of the estate tail, but the same was expectant thereon; and as whoever takes by descent must take as heir to him who was last actually seised, therefore Ann took the reversion wholly as heir to her father. And as to this, 1 Inst. 14, 15. and Kellow v. Rowden, in Carthew and Shower, were held to be authorities in point."

Lord Alvanley has observed that the preceding case was misstated in Wilson; as all the reasoning showed it must have been determined in favour of the lessors of the plaintiff.

6. A right to an estate in remainder or reversion descends to the half blood. For where a person having such a right dies, before the estate in remainder or reversion falls into possession, he cannot acquire such a seisin as to become the stock of an inheritance; therefore his heir of the half blood, if he is heir to the donor or settlor of the remainder or reversion, will become entitled to it.

7. Thus if there be a gift to baron and feme in special tail, remainder to the right heirs of the baron, and they have issue, the feme dies, the baron takes another feme, and hath issue and dies, and the eldest son enters and dies without issue, the second son of the half blood shall have the remainder; because the eldest was not seised thereof in his demesne. Lord Coke has stated this case, and observed that the rule is, *possessio fratris de feodo simplici facit sororem esse*

3 Bos. & Pul.
Rep. 658.
Doe v. Hut-
ton.
Goodright v.
Searle,
Ferne Cont.
Rem. 561.
6th ed.

A Right to a
Remainder,
&c. descends
to the Half
Blood.

1 Roll. Ab.
628. pl. 6.

1 Inst. 14 b.

hæredem ; and here the eldest son was not possessed of the fee simple, but of the estate tail.

1 Roll. Ab.
628. pl. 7.

8. So if land be given to J. for life, remainder to R. his son in tail, remainder to the right heirs of J. ; and J. dies, and R. enters as tenant in tail, and dies without issue, T. the son and heir of J. of the half blood to R. shall have the land by descent, and not the heir of R. ; because R. was never seised in fee in demesne.

Idem, pl. 8.

9. So if a gift be made to a person in tail, remainder to his right heirs, and after the donee dies, having issue a son by one venter, and a son by another venter, and the eldest son enters and dies without issue, his brother of the half blood shall inherit the remainder by descent, because the elder brother was never seised thereof in demesne.

Idem, pl. 9.

10. So if the eldest son be seised in tail, with a remainder or reversion by descent to him, from his father in fee, and dies without issue ; his brother of the half blood shall have the remainder or reversion by descent ; because his brother was never seised thereof in demesne.

1 Inst. 15 a.

11. Lord Coke says, if a father makes a lease for life, or a gift in tail, and dies, and the eldest son dies in the lifetime of the tenant for life, or tenant in tail ; the younger son of the half blood shall inherit the reversion : because the tenant for life or tenant in tail was seised of the freehold, and the eldest son had nothing but the reversion expectant upon that freehold ; therefore the younger son shall inherit the land, as heir to his father, who was last seised of the freehold.

Idem, & n. 5.

12. Lord Coke has also observed, that although a rent had been reserved on the lease for life, and the eldest son had received it, yet it was holden by some

that the younger brother should inherit; because the seisin of the rent, was no actual seisin of the freehold of the land; but that 35 Ass. pl. 2. seemed to the contrary, because the rent issued out of the land, and was in lieu thereof. It is however said in Lord Hale's Notes, published by Mr. Hargrave, to have been adjudged in the case of *Piper v. Masters*, Trin. 1657, that in such a case, seisin of rent did not make a *possessio fratris*.

13. Although the eldest son enters on the death of his father, and gets actual possession of the fee simple, yet if the widow of the father be endowed of a third part, and the eldest son dies in the lifetime of the widow, the younger brother of the half blood will inherit the reversion of the third part, notwithstanding the elder brother's entry; because the actual seisin which he acquired thereby, was defeated by the endowment. 1 Inst. 15 a.
Tit. 6. c. 4.
§ 25.

14. Where there are two sons, or two daughters, by different venters; and a remainder or reversion expectant upon an estate for life is purchased by the father, who dies in the lifetime of the tenant for life, and the eldest son or daughter also dies in the lifetime of the tenant for life, the half blood shall inherit; for in this case the claim is from the father. Jenk. Cent.
6 Ca, 25.

15. In the case of *Cunningham v. Moody*, where a limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue, to the right heirs of the husband in fee, the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage; and upon the death of the first daughter without issue, the question was, whether her sister of the half blood was entitled to the reversion in fee. Lord Hardwicke 1 Ves. 174.
Doe v.
Hutton,
3 Bos. 643.

held, that as the reversion which descended on the eldest sister was never clothed with possession, it would descend to the sister of the half blood.

An Act of
Ownership
operates as
a Seisin.

16. Where the person entitled to a remainder or reversion, exercises an act of ownership over it, by granting it for life, or in tail; this is deemed equivalent to an actual seisin of an estate, which is capable of being reduced into possession by entry; and will make the person exercising it a new stock or root of inheritance. For an entry being impossible, the alienation of the remainder or reversion for a certain time, is allowed to be sufficient to change the descent; because such alienation being formerly always attended with attornment, was deemed equal, in point of notoriety, to an entry on a descent.

1 Inst. 15 a.
8 Rep. 35 b.

17. Thus Lord Coke, after stating the case of a son's endowing his father's widow, says—"But if the eldest son had made a lease for life, and the lessee had endowed the wife of his father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life; and the reversion is now expectant on a new estate for life." In another place he says—"for many times the change of the freehold makes an alteration or change of the reversion." This doctrine has been confirmed by Lord Hardwicke in the following case.

Id. 191 b.

Stringer
v. New,
9 Mod. 363.

18. A. being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the heirs of his own body, remainder to the right heirs of his father; had a sister of the half blood, and also a sister of the whole blood. A. conveyed the estate to B. by lease and release, in trust for payment of debts, and levied a fine thereof.

Lord Hardwicke said, the question was, whether A. had made any alteration as to the descent of the reversion in fee. If he had not, it would descend to the sister of the half blood, who was the elder daughter, and equally heir to the father with the other daughter. But if he had altered it and given it to himself, it would descend to the sister of the whole blood, who claimed as heir to her brother, who was last actually seised, and who would be entitled under that known rule of law, that *possessio fratris de feodo simplici facit sororem esse hæredem*. But then it was certain that must be an actual possession; so that it was argued in this case that this being an estate for life in A. with a remainder in tail, and a reversion in fee expectant; this was not such a possession as would entitle the younger daughter to take under a *possessio fratris*.

What was insisted upon on the other hand, in order to have altered the course of descent, and given it to the heirs of A. instead of the father, was, that A. had made a lease and release, and thereby conveyed the estate to B., in trust for the payment of debts, &c. and levied a fine thereof; but had not suffered a recovery. And the question was, whether this fine had changed the reversion in fee, and thereby altered the descent.

He was of opinion that it did alter the reversion; that therefore the estate would go to the right heirs of A.; and founded his opinion on the two passages ante § 17. stated in a former section from Coke on Littleton, 15 *a.* and 191 *b.*; from which it appeared, that in consequence of such change in the reversion, it should descend to the heir of the son; and therefore entitle the younger sister of the whole blood to claim as heir to him by a *possessio fratris*. The conveyance was

by lease and release to B., to pay debts, &c. ; and surely this was a great alteration, for this amounted to a grant of his estate for life ; it likewise passed the reversion in fee ; for as he was right heir of his father, he had a reversion to grant, though it would descend to the right heirs of the father, without any such alteration ; and though the estate was subject to redemption on payment of the debts, &c. yet it would follow the heirs of the son, because the son had changed it, and made it his own by a plain alteration.

He then said he should consider what would be the effect of the fine, supposing the lease and release out of the case. That fine would certainly have barred the remainder in tail to himself, for he was seised for life, with remainder to the heirs of his own body ; so that the fine barred the estate, and would have amounted to a grant of the reversion in fee, if to a stranger. Now this reversion in fee, instead of being expectant on the estate tail, as it originally was, did now depend on an estate in contingency. Therefore on this case, whether the reversion being thus changed, should alter the descent of it, so as to go to the heirs of the son, he was clearly of opinion that it was literally within what was laid down in Co. Lit. 191 b. that if the elder brother change the freehold, it shall alter the reversion likewise, and shall cause a *possessio fratris*. In this case both the conveyances changed the reversion, and therefore the estate descended to the heir of the whole blood to the brother.

TITLE XXIX.

DESCENT.

CHAPTER V.

Of Descent by Statute and Custom.

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|------------------------------------|---|
| 1. <i>Descent of Estates Tail.</i> | 19. <i>Cannot be altered by Limitation.</i> |
| 6. <i>Go to the Half Blood.</i> | 20. <i>Copyhold Descents.</i> |
| 7. <i>No Corruption of Blood.</i> | 26. <i>The Half Blood excluded.</i> |
| 9. <i>Customary Descents.</i> | 31. <i>Construed strictly.</i> |
| 10. <i>Gavelkind.</i> | |
| 15. <i>Borough English.</i> | |

SECTION 1.

BESIDE the descent of lands in fee simple, there are two other modes of descent, of which it will be proper to give an account*. The first of these is the descent of estates tail, which is regulated by the statute *de donis conditionalibus*; and is therefore called descent by statute. Descent of Estates Tail.
Tit. 2. c. 1.

2. The descent of an estate tail resembles that of a *feudum novum*; for the person to whom an estate tail is originally given or limited, is the first purchaser of it; and none but those who are lineally descended from him can derive a title to it by descent †.

* The descent of dignities has been already discussed in Title 26; and the descent of estates held by prescription will be noticed in Title 31.

† The descent of an estate limited to the heirs of the body of A. will be stated in Tit. 32. c. 21.

Tit. 2. c. 1.

3. In some cases the descent of an estate tail is not only confined to the lineal descendants of the first purchaser, or donee, but is restrained to those of the male sex, as in the case of estates in tail male; or to those who are born of a particular woman, as in the case of estates in tail special.

1 Inst. 46 a.
7 Rep. 8 b.

4. The descent of an estate tail may be defeated by the subsequent birth of a nearer heir in tail. Thus, if a tenant in tail general dies, leaving a daughter, and after his wife is delivered of a son, such son may enter; for this was an estate tail vested.

5. The maxim that *seisina facit stipitem*, does not take place in the descent of estates tail: it being only necessary, in deriving a title to an estate of this kind by descent, to deduce the pedigree from the first purchaser, and to show that the claimant is heir to him; for the issue in tail claim *per formam doni*; that is, they are as much within the view and intention of the donor, and as personally and precisely described in the gift, as any of their ancestors.

Go to the
Half Blood.1 Inst. 15 b.
3 Rep. 41 b.8 Term R.
213.

6. The exclusion of the half blood does not take place in the descent of estates tail; because the descent from the first purchaser, or original donee of the estate, must be strictly proved; and when the lineage is thus made out, there is no need of this auxiliary evidence. Lord Coke says, the issue in tail is ever of the whole blood to the donee. And in a modern case Lord Kenyon observed, that in the case of estates tail, the half blood coming within the description of the entail, may inherit as effectually as the whole: there the rule of *possessio fratris* does not apply.

No Corruption
of Blood.

7. The doctrine of corruption of blood does not take place in the descent of estates tail; for notwithstanding the forfeiture of lands entailed by attainder

of high treason, yet the blood of the person attainted is not corrupted so as to impede the descent: because (says Mr. Yorke) "the forfeiture of estates tail came in by the construction of the statute 28 Hen. VIII. The Judges resolved that the general words of that statute comprehended these estates. But then such laws being of a penal kind, though they are to be construed so as to attain their full effect, yet they are to be construed strictly; and however they might extend to make estates tail liable to forfeiture where they are actually in the offender's possession, and consequently in his power to alienate; they could, by no rules of construction, be extended to bring consequential disabilities on the heir, where the estates have not been in the offender's possession."

Law of Forfeiture, 82. 4th edit.

8. Thus, where there was grandfather, father, and son; the grandfather was tenant in tail, the father was attainted of high treason, and died in the lifetime of the grandfather, afterwards the grandfather died. It was agreed that the land should descend to the son, notwithstanding the attainder of the father; for the father had not the land, either in possession or in use; in which two cases only the act of 26 Hen. VIII. gave the forfeiture: and his attainder was not any corruption of blood for the land in tail.

Lumley's Case, cited 3 Rep. 10 b. Jenk. 82. 206. Mantell v. Mantell, Cro. Eliz. 28.

9. There are some other modes of descent, which are derived from the peculiar customs of particular places, and which differ in many respects from descents by common law: of these, the principal are, the descent of lands held in gavelkind, in borough english, and by copy of court-roll.

Customary Descents.

10. The descent of lands held in gavelkind, in the right line, is among all the sons, as coparceners; and in default of sons, among all the daughters, in the

Gavelkind. Lit. § 210. 265. Robin. Gav. 90.

same manner : but though females, claiming in their own right, are postponed to males, yet they may inherit together with males by representation ; for the right of representation takes place in customary descents, as well as in descents at common law. If therefore a man has three sons, and purchases lands held in gavelkind, and one of the sons dies in the lifetime of his father, leaving a daughter, she will inherit the part of her father : yet she is not within the words of the custom, (*inter hæredes masculos partibilis*) ; for she is no male, but the daughter of a male, coming in his stead by representation.

1 Inst. 100 a.
Rob. Gav. 92.

11. The partible quality of lands held in gavelkind is not confined to the right line, but is the same in the collateral one. For it has been resolved, that where one brother dies without issue, all the other brothers shall inherit from him ; and in default of brothers, their respective issue shall take, *jure representationis* : but where the nephews succeed with an uncle the descent is *per stirpes*, and not *in capita* : and so, from the nature of the thing, it must be, where the sons of several brothers succeed, no uncle surviving ; for though in equal degree, they stand in the place of their respective fathers.

Lit. § 265.
Dyer, 179 b.
Rob. Gav. 94.

12. Although an estate tail is a kind of inheritance introduced by the statute *de donis conditionalibus*, yet this partible quality extends to it ; for if a person dies seised in tail of lands held in gavelkind, all his sons shall inherit together, as heirs of his body.

Id. 97.

13. Descendible freeholds are also partible, where the lands are held in gavelkind : as if a lease be made of lands of this kind to a man and his heirs, during the life of A., and the lessee dies, living A., the lands shall descend to all his sons as special occupants.

Tit. 3. c. 1.
§ 52.

14. The exclusion of the half blood takes place in the descent of lands held in gavelkind. *Rob. Gav. 99.*

15. With respect to lands held in borough english, Littleton, § 165, says, some boroughs have a custom, that if a man has issue many sons, and dies, the youngest shall inherit all the tenements which were his father's within the same borough, by force of the custom. *Borough English. Rob. App.*

16. If lands, of the nature of borough english, be let to a man and his heirs, during the life of J. S., and the lessee dies, living J. S., the youngest son shall have them. *1 Inst. 110 b.*

17. The right of representation takes place in the descent of lands held in borough english: therefore, if the youngest son dies in the lifetime of his father, leaving a daughter, she will inherit the lands. *Clements v. Scudamore, infra.*

18. The custom of borough english is however confined to lineal descents, and does not extend to collateral ones; so that where lands held in borough english descended to the youngest son, and he died without issue, it was resolved that they did not go to the younger brother; for the custom did not take place in the descent between brothers, but the eldest brother inherited. Lord Coke has however said, that by some customs the youngest brother shall inherit: but this extension of borough english to the collateral line must be specially pleaded. *Rob. Gav. 93. Bayley v. Stevens, Cro. Ja. 198.*

19. The descent of lands held in gavelkind and borough english cannot be altered by any limitation of the parties: therefore, where A. seised in fee of lands held in borough english, made a feoffment to the use of himself and the heirs male of his body, according to the course of the common law; the words, "according to the course of the common law," *Cannot be altered by Limitation. Jenk. Cent. 5 Ca. 70. Dyer, 179 b.*

were held void; for customs which go with the land, as this one, and gavelkind, and fix and order the descent of inheritances, can only be altered by parliament.

Copyhold
Descents.
Tit. 10. c. 3.
§ 16.

20. Estates held by copy of court-roll are in general descendible in the same manner as estates held in socage; though in some manors a different mode of descent is established by custom: but the ceremonies of the feudal law are still followed; for when a copyholder dies, his death must be presented by the homage, at the next court, and proclamation made for the heir to claim, who must come in within a limited time, and be admitted; else he will forfeit his right.

Idem, c. 5.
§ 34.

Cop. § 41.

21. Lord Coke says, the heir is tenant by copy immediately on the death of his ancestor; not to all intents and purposes, for peradventure he cannot be sworn of the homage before, neither can he maintain a plaint in the lord's court before, because till then he is not complete tenant to the lord, no farther forth than the lord pleaseth to allow him for his tenant: so that to all intents and purposes, the heir, till admittance, is not complete tenant; yet to most intents, especially as to strangers, the law takes notice of him, as of a perfect tenant of the land, instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass done upon the ground, surrender into the hands of the lord, to whose use he pleaseth, satisfying the lord his fine, due upon the descent; and by estoppel he may prejudice himself of his inheritance.

4 Rep. 23 b.

Gilb. Ten.
192.

2 P.Wms. 15.
1 Atk. 449.

22. The heir of a copyholder is not however compellable to accept the inheritance. But if he

does not come in and accept, the lord may seize the copyhold to his own use.

23. The right of representation takes place in the descent of copyholds: for whenever the custom gives any person the heirship, the law will give all necessary rights and incidents.

24. J. S. having issue five sons, the youngest died in the lifetime of his father, leaving issue a daughter. Afterwards J. S. purchased the lands in question, which were copyhold. The Jury found, that by the custom these lands were descendible to the youngest son and his heirs. The father died, and the question was, whether the lands descended to the daughter of the youngest son, or to the eldest son.

Clements v. Scudamore,
2 *Ld. Raym.*
1024.
1 *P. Wms.*
63.

Lord Holt.—“ We are all of opinion that the daughter ought to have the lands, *jure representationis*. Wherever this custom hath obtained, the youngest son is thereby placed in the room of the eldest son, who inherits by the common law; and there is no other difference in the course of descent, but that the custom prefers the youngest son, and the common law the eldest son; and therefore as at the common law the issue of the eldest son, female as well as male, do inherit *jure representationis*, before the other brothers; so, by the same reason, where this custom has transferred the right of descent from the eldest son to the youngest, it shall also carry it to the daughter of the youngest son, by like representation; and there is no reason to make any difference between a descent by this custom, and at common law; though Lord Coke is of a different opinion.”

Godfrey v. Bullock,
1 *Roll. Ab.*
623.

25. Where a copyhold estate has been derived from the mother's side, it will go to the heirs on the part of the mother; unless the copyholder departs with

Co. Cop.
§ 50.
Taverner v. Cromwell.

4 Rep. 27.
Tit. 37. c. 1.
& 2.

it, and acquires a new estate by purchase. And if it has been resolved, that a surrender and re-surrender of a copyhold, as also a recovery suffered in the lord's court, will alter the descent.

The Half
Blood ex-
cluded.

4 Rep. 22 a.
Gilb. Ten.
158.

Cop. § 41.

26. The rule respecting the half blood takes place in the descent of copyholds : and the estate which the heir may acquire by entry, before admittance, is sufficient to establish a *possessio fratris*. Thus Lord Coke says, if a copyholder in fee has issue a son and a daughter by one *venter*, and a son by another *venter*, and dies ; and the son by the first *venter* enters into the land, but dies before admittance, the daughter shall inherit as heir to her brother ; not the son by the second *venter*, as heir to his father.

Anon.
Dyer, 291 a.
pl. 69.

27. A man, tenant in fee of a copyhold, had issue two daughters by different *venters*, and died seised thereof. The daughters entered and took the profits for several years, without any admittance. The eldest daughter died without issue : afterwards the youngest daughter was admitted to the whole, as sole heir to her father. The question was, whether the next heir of the whole blood to the eldest daughter should have the moiety. By the opinion of Walsh and Dyer, Justices, the possession aforesaid, without admittance, was sufficient in law to make the collateral heir inheritable ; and it was ordered by the Lord Keeper accordingly.

Id. 292 a.

28. A copyholder had issue a daughter by one *venter*, and a son by another, and died, the son within age. The lord of the manor committed the custody of the land during the nonage, to the mother of the son, who entered ; afterwards the son within age died, without any admittance of him as heir. The daughter, who was his sister by the half blood, prayed to be admitted ; but by the opinion of Catlyn and

Dyer, to whom the question was referred, she should not be admitted; because the possession of the mother as guardian, gave actual possession to the son. Co.Cop. §41.

29. In a modern case, the entry of a widow, as guardian to her son, was held to have the effect of obtaining a possession for the son, sufficient to exclude the half blood. *Forder v. Wade*, 4 Bro. R. 520.

30. It is said by Lord Ch. Baron Gilbert, that where a copyholder by licence made a lease for years, the lessee entered, and the lessor died, having issue a son and a daughter by one *venter*, and a son by another; then the eldest son died. It was adjudged that the daughter of the whole blood should inherit, because the possession of the lessee for years was the possession of the elder brother, who might have possession before admittance; for in that case he was not admitted: and if it was reasonable in such a case at common law, to keep the inheritance out of the half blood, so it was in copyholds. Ten. 158.

31. Where the customary descent is different from that by the common law, it is construed strictly. *Construed strictly.* For the law does not take notice of any special customs of this kind, except gavelkind and borough english, unless they are expressly pleaded; and then the Courts will not carry them farther than the words of the custom.

32. By the custom of a manor, the copyhold lands of every tenant dying *seised*, were descendible to the youngest son. A surrender was made to the use of B. and his heirs, who died before admittance. If B. had been admitted, it was agreed that after his death the youngest son should have inherited; but dying before admittance, the question was between the eldest and youngest son of B. who should have the lands. *Paine v. Herbert*, 2 Keb. 158. 2 Ld. Raym. 1025. Adjudged, that the eldest son should in

this case inherit, because of the straitness of the custom; there never having been any seisin in the ancestor.

Rapley v.
Chaplin,
Godb. 166.
4 Leon. 242.

33. If a custom be alleged that the eldest daughter shall solely inherit, the eldest sister shall not inherit by force of that custom. So if the custom be that the eldest daughter and the eldest sister shall inherit, the eldest aunt shall not inherit. So if the custom be that the youngest son shall inherit, the younger brother shall not inherit.

1 Roll. Ab.
624. pl. 2.

Reeve v.
Malster,
Cro. Car.
410.

34. George Reeve, copyholder in fee of lands being parcel of the manor of Hoo, where the custom was, that the land was of the nature of borough english, descendible to the youngest son, had issue three sons, William, George, and Charles, and surrendered his copyhold to the use of himself and Ann his wife and his heirs, to which they were admitted accordingly. Afterwards George the father died, seised of the reversion, which descended to the said Charles his youngest son, who died without issue. The question was, whether the eldest or second son should inherit from Charles. It was resolved that George the second son could not have it as brother and heir to Charles by the custom, for the custom could extend to the youngest son only, and not amongst the brothers, where no such custom was found: and without a special custom found, that it should descend to the youngest brother, the law would not admit it; because customs ought always to be taken strictly.

Denn v.
Spray,
1 Term R.
466.

35. Joseph Stanley being seised of a copyhold estate, died intestate, and without issue; leaving one niece, Ann Wragg, and the representatives of two other nieces, who died before him; Ann Goodwin, only child of Mary his second niece, and Joseph Spray, the eldest son of Elizabeth his eldest niece; who were

the daughters of Thomas Stanley, who was the elder brother of Joseph.

A parchment writing was produced upon the trial by the steward, as the customary of the manor, which was admitted as evidence, it being an ancient writing without date, found among the court-rolls, and delivered down from steward to steward, and stated to be *ex assensu omnium tenentium*; in which were the following articles respecting descents,—*Si aliquis tenens hujus manerii obierit, filius suus primogenitus et legitime procreatus habeat hereditamenta; et si contingat alicui quod non habeat filium, filia sua antenata habeat hæreditatem suam absque partitione.* It appeared from the court books that there were several entries where the eldest daughter, and others where the eldest sister, had been admitted as heir; but it did not appear that the eldest niece had ever been admitted as heir.

The question was, whether Joseph Spray the defendant, who was in possession as the representative of the eldest niece, should inherit; or whether the copyhold should descend according to the rules of the common law, and be divided among them.

The Court said, that as there was no proof in the court-rolls of the course of succession in the collateral line, further than the case of a sister, it followed that this copyhold did not go to the youngest niece.

Another argument arose from the particular penning of the custom, which said,—*Si aliquis tenens hujus manerii obierit.* Now Thomas Stanley, the grandfather of Joseph Spray the defendant, never was a *tenens manerii*; therefore the custom, as to the course of descent, never attached upon him.

Roe v. Parker,
5 Term Rep.
26.

36. In ejectment to recover certain customary lands, the lessor of the plaintiff claimed under a custom of the manor, for the youngest kinsman or kinswoman to inherit, in default of brothers and sisters of the person last seised. The plaintiff offered in evidence an entry in the court-rolls of the manor, stating what the custom was: the defendant's counsel objected that such evidence of the custom ought not to be received, until instances had been proved of such a mode of descent having taken place.

The jury found a verdict for the plaintiff. Upon a motion for a new trial, on the ground that the evidence of the presentment of such a custom on the court-rolls, by the homage, was not of itself sufficient to establish the custom, inasmuch as no instance was produced of its being put in use; which, it was contended, was the true principle on which the determination of *Denn v. Spray* was founded.

ante, § 35.

Lord Kenyon.—“I admit that the custom of one manor cannot be extended by analogy to another: but the mode of descent, under which a party claims, must be established by proof; and the question here is, whether or not there were any evidence of the custom, upon which the plaintiff's claim was founded? The custom is clearly defined in the paper writing, produced from the court-rolls; and without referring to the strict rules of law, let us consider the authenticity of this document on principles of plain common sense. Near a century and a half ago, the homage (the tenants holding under the lord of the manor), being convened together *eo nomine* as the homage, not for the purpose of extending their claims, either against the lord or strangers, but in order to ascertain those rights which were their own, in common

with the rest of the tenants ; and being possessed of all that information which either tradition or their own personal observations could furnish, proceeded to describe the several customs which regulated the descent of the different species of tenure within this manor. Now, can it be supposed that these persons, acting under the sanction of an oath, could, for no purpose whatever, give a false representation of these customs ? or is it not more probable that their account was the true one ? Common sense and common observation would induce us to believe the latter.

“ The argument against the verdict seems to admit, that this document was a degree of evidence when it was produced to the jury ; and, if it were admissible in evidence, it not being opposed by any other species of evidence, and the jury having given credit to it, it puts an end to the question. And that this was admissible cannot be doubted ; for tradition and the received opinion are the evidence of the *lex loci*.

“ A distinction indeed prevails between a prescription, as applied to a particular tenement, and a custom affecting the whole district ; and the latter has gone so far, that the custom of one manor has been given in evidence to show the custom of another, where they are both governed by the border law. Now, here was full proof of a tradition respecting the custom of descent in this manor ; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of that court, delivered on an occasion when they were discussing the interests of all the tenants of the manor. I cannot distinguish this from the instance of a terrier, which is certainly evidence. The case of *Godwin v. Spray* is distinguishable from the present. Every thing, that was said by the Court in giving judgement, must be

understood *secundum subjectam materiem*. That case first decided that such an instrument as the present is admissible; and then that part of it, which said that lands were not partible, either between males or females, in general terms, was to be explained by the custom, as it had existed in point of fact, which did not extend to nieces. And if that decision go farther, and determine that such a document is not admissible in evidence, unless instances in fact be previously proved to warrant the production of it, I must beg leave to dissent from it. In this case, supposing the defendant had demurred to this evidence, I think the Court must have drawn the same conclusion from it, which the jury have drawn; and therefore, on the law of the case, I think that the rule for a new trial should be discharged."

TITLE XXX.

ESCHEAT.

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|--|---|
| 1. <i>Of Title by Purchase.</i> | 32. <i>Nor Money to be laid out in Land.</i> |
| 6. <i>Of Escheat.</i> | 33. <i>To whom Lands escheat.</i> |
| 11. <i>Escheats for Default of Heirs.</i> | 35. <i>The Lord by Escheat may distrain for Rent.</i> |
| 12. <i>From Corruption of Blood.</i> | 36. <i>Is entitled to a Term to attend.</i> |
| 15. <i>No Escheat where there is a Tenant.</i> | 38. <i>And to all Charters.</i> |
| 19. <i>Any Alienation prevents an Escheat.</i> | 39. <i>Is subject to Incumbrances.</i> |
| 23. <i>What Things escheat.</i> | 41. <i>Was not bound to execute a Use.</i> |
| 28. <i>A Trust Estate does not escheat.</i> | 42. <i>Is not subject to a Trust.</i> |
| 31. <i>Nor an Equity of Redemption.</i> | 46. <i>Office of Escheator.</i> |

SECTION 1.

OF the two modes of acquiring a title to real property, the first, namely descent, has been explained in the preceding title. We now therefore come to the second, that is, purchase; which is thus defined by Littleton, § 12. "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed." Of Title by Purchase.

2. Lord Coke, in his comment on this section, 1 Inst. 18 b. observes, that a purchase is always intended by title, and most properly by some kind of conveyance, either for money, or for some other consideration, or freely of gift, for that is, in law, also a purchase: and accordingly the makers of the statute 1 Hen. V. Plowd. 47.

c. 3. speak of those who have lands or tenements by purchase, or descent of inheritance.

3. The feudal writers call purchase *conquestus*, or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance. The

Grand Coust. Norman jurists styled the first purchaser, or person who first acquired the estate *the conquereur*. And

Lib. 7. c. 1. Glanville uses the word *questus*, to denote the property which a person has acquired by his own act, and not by descent.

4. The difference between the acquisition of an estate by descent, and by purchase, consists principally in two points. 1st. That by purchase the estate

Tit. 29. c. 3. § 31. acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2d. An estate taken by purchase will

not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will.

5. Sir W. Blackstone has enumerated the following modes of acquiring an estate by purchase; escheat, occupancy, prescription, forfeiture, and alienation. Of these I shall only treat of escheat, prescription, and alienation. Occupancy having been already noticed in Title III. and forfeiture being noticed under that and several other Titles.

Of Escheat. 6. It has been stated that by the feudal law, when

Dissert. c. 1. § 79. the tenant died without heirs, the lord became entitled to the feud. This law, which was introduced here by the Normans, is founded on the principle that

2 Inst. 64. Wright's Ten. 115. the blood of the person last seised in fee is by some means or other utterly extinct and gone: and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance itself must fail. The land must become what the feudal writers call *feodium apertum*,

and result back to the lord of the fee ; from whom, or from whose ancestor, it was originally derived.

7. This mode of acquiring an estate is called an escheat, which Lord Coke says is a word of art, derived from the French word *eschier*, *quod est, accidere* : for an escheat is a casual profit, *quod accidit domino ex eventu et ex insperato*, which happeneth to the lord by chance, and unlooked for. 1 Inst. 92 b.
Id. 13 a.

8. An escheat it therefore in fact a species of reversion, and is so called and treated by Bracton. 23 a. When a power of alienation was introduced, the change of the tenant, changed the chance of the escheat, but did not destroy it ; and as soon as a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres*.

9. Fitzherbert says, a writ of escheat lies where a tenant in fee simple of any lands or tenements which he holds of another dies seised without heir general or special ; the lord shall have a writ of escheat against him who is tenant of the lands, after the death of his tenant, and shall recover the land ; because he shall have the same in lieu of his services. N. B. 143.

10. Mr. Hargrave has justly observed, that an escheat in appearance participates in the nature both of a purchase, and of a descent. Of the former, because some act of the lord is requisite to perfect his title ; and the actual possession of the land cannot be gained till he enters or brings his writ of escheat. Of the latter, because it follows the nature of a seignior, and is inheritable by the same person. 1 Inst. 18 b.
n. 2.

11. An escheat may happen in two ways ; *aut per defectum sanguinis*, that is, for default of heirs ; *aut per delictum tenentis*. Escheats arising from default of heirs, Escheats for
default of
Heirs.
1 Inst. 13 a.

whereby the descent is at an end, can only be in the three following cases : 1. Where the tenant dies without any relations on the part of any of his ancestors. 2. Where he dies without any relations on the part of those ancestors from whom the estate descended ; and 3. Where he dies without any relations of the whole blood. For in all these cases there is no one capable of inheriting from him,

From Cor-
ruption of
Blood.

12. Escheats *propter delictum tenentis*, arise in consequence of a person's being attainted of treason or felony ; by which he becomes incapable of inheriting from any of his relations, or of transmitting any thing by heirship. So that if any one dies seised in fee of lands, whose heir at law is attainted, the lands escheat : and where a person attainted dies seised of lands, as he cannot have an heir, they will also escheat, unless forfeited : where that happens, they are interrupted in their passage by the Crown. In the case of treason, for ever. In that of felony, for a year and a day ; after which they escheat to the lord of whom they are held.

1 Inst. 13 a.

13. There is one case in which lands are not liable to escheat ; for if an estate held of J. S. be given to a dean and chapter, or to a mayor and commonalty, and to their successors, and such corporation is dissolved, the land shall not escheat to the lord, but shall revert to the donor. Lord Coke says, the reason of this diversity is, that in the case of a body politic, the fee simple is vested in them in their political capacity ; therefore the law annexes a condition to every such gift, that if such body politic be dissolved, the donor shall re-enter, for that the cause of the gift faileth. But no such condition is annexed to an estate in fee simple, vested in any man in his natural capacity ; except in cases where the donor reserves a

tenure ; and then the law implies a condition by way of escheat.

14. It is however laid down in 37 Eliz. that where land, rent, &c. is granted to a corporation and their successors, if the corporation grants them over, and is dissolved, they shall not revert to the grantor.

Southwell
v. Wade,
1 Roll. Ab.
186.
Poph. 91.
Godb. 211.

15. As the lord's right to an escheat arises solely from the want of a tenant, to do the services ; it follows, that whenever there is a tenant, the lord cannot claim the lands by escheat.

No Escheat
where there
is a Tenant.

16. Thus Littleton says, if there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enters, as in his escheat ; the disseisee may enter upon the lord ; because the lord does come to the land but by escheat.

Lit. § 390.
Gilb. Ten. 25.

Mr. Butler has observed on this passage, that when the lord comes to the land by escheat, the law only casts the freehold on him for want of a tenant ; the disseisee, notwithstanding the disseisin, continues the rightful tenant ; and as by his entry he fills the possession, the lord's title, which was good only while a tenant was wanting, must necessarily be at an end.

1 Inst. 240 a.
n. 1.

17. Fitzherbert says, if the tenant be disseised, and afterwards die without heir, it seemeth the lord shall have a writ of escheat, because the tenant died in the homage. Lord Coke observes, that if the disseisor dies seised, and the disseisee dies without heir, and afterwards the lord accepts rent from the heir or feoffee of the disseisor, this shall bar him of his escheat ; because they are in by title. For if the disseisor had made a feoffment in fee, or died seised, and after the disseisee died without heir, there would be no escheat ; because the lord had a tenant in by title.

N. B. 144.

1 Inst. 268 a.

N. B. 144.

18. It is, however, laid down by Fitzherbert, that where a man has a title to a writ of escheat, if he accepts homage of the tenant, he shall not have the writ against him, because he has accepted him as his tenant. So if he accepts fealty of him. But receipt of rent will not bar a writ of escheat.

Any Alienation prevents an Escheat.

19. From this principle it also follows, that any actual alienation of the tenant will bar the lord of his escheat. But a mere contract for sale will not bar the lord, as will be shown hereafter.

4 Rep. 124 a.
8—44 a.
Tit. 32. c. 4.

20. If an infant makes a feoffment in person, and dies without heir, the land shall not escheat; otherwise, if it was made by letter of attorney. For the lord by escheat being only a privy in law, cannot take advantage of infancy; because he is a stranger to the infant. It is the same of an idiot or lunatic.

1 Inst. 236.
n.

21. A devise, though it only takes effect at the moment of the testator's death, will prevent an escheat. And, in a note of Lord Nottingham's to the first Institute, it is said, that where a woman, seised of lands in London, devised them to be sold by her executors, and died without an heir, the devise prevented the escheat, which the King pretended to have; and the executors might enter and sell; therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, this case being stated, Lord C. J. Rolle doubted of the opinion; because, he said, it was only a descent according to the words of Littleton: and it appeared to him, that when lands were devised to be sold by executors, there no interest passed.

1 Roll. R.
214.
3 Bulst. 43.
Godb. 411.

Reave v.
Att. Gen.
MS. R.
2 Atk. 223.

22. A man devised his estate to his wife for life; and that, after her death, it should be sold by A., and the money to be divided amongst the plaintiffs. The testator died without heir; before any sale A.

died also. It not appearing that the land was held of any mesne lord, the plaintiffs brought their bill against the Attorney General, praying to have the will established, and to hold and enjoy against the Crown, or to have the lands sold pursuant to the will.

Lord Hardwicke said, if he could relieve the plaintiffs, he would. That he thought, at first, this was a bill brought to prove a will, by which the lands themselves were devised to somebody: if so, he would have thought such a bill proper; would have declared the will to be well proved; and decreed the devisee to sell, without any occasion of making a decree against the Crown. But here was no devisee of the land, only a power to sell. If A. had lived, as he had only a power, and no interest in himself, none could arise from him, but from the testator; and he, as well as the testator, being dead, there was none to make a decree against. If any thing of the sort that was prayed for could be done, it must be in the Court of Exchequer, which was a court of revenue, and the proceedings in a petition of right; though called a petition, as much a legal proceeding as by original writ.

Suppose this land had been seised and put in charge; could he make any decree relating to it?—None. But the Court of Exchequer could. He could neither decree the Crown to sell, nor the plaintiffs to hold and enjoy against the Crown. The bill was dismissed.

23. All lands and tenements held in socage, whether of the King or of a subject, are liable to escheat. But it follows, from the nature of an escheat, that it must be of the entire fee; therefore, an estate tail does not escheat, but goes to the person in rever-

What Things
escheat.

Fitz. N. B.
144.

sion, unless the tenant in tail has also the reversion in fee; for in that case the whole estate will escheat.

Rob. Gav.
226.

24. Lands held in gavelkind do not escheat for felony, but descend to the heir of the felon. From which Sir W. Blackstone concludes, that the tenure of gavelkind is of Saxon, and not of Norman, origin.

Co. Cop.
§ 28.
2 Ves. Jun.
187.

25. Copyholds are subject to escheat; but before the lord of the manor can enter on the lands, the homage must present the death of the tenant without heirs, and proclamations must be made, to give notice that if any person can prove himself heir to the last tenant, he shall be admitted.

3 Inst. 21.
Hard. 496.

26. No species of real property is, however, subject to escheat, but what lies in tenure; for escheat is a consequence and fruit of tenure. Thus, if a person seised in fee of a rent-charge, right of common, free warren, or any kind of inheritance that is not holden, is attainted of felony, the King shall have the profits of them during the life of such person; but after his decease, as they cannot descend to his heirs, on account of the corruption of his blood, they become extinct. For in escheats on account of petit treason or felony, a tenure is requisite, as well in the case of the King as in that of a subject.

Tit. Escheat,
pl. 6.

27. It is said in Roll's Ab. that if a man grants an advowson in gross to another in fee, and the grantee dies without heir, it seems that it shall revert to the grantor, not being held of any one. He adds, that it seems, if the grantor shall not have it, the King shall, as supreme ruler. But in Title Tenures, B. pl. 1., it is expressly said, that an advowson in gross lies in tenure; and in Brook's Ab. Tit. Tenure, pl. 15., a case is stated, where, in a *quare impedit*, the plaintiff entitled himself, that the advowson was held of him

by homage and fealty; and it was not contradicted that the advowson well lay in the tenure.

28. A use was not liable to escheat, because it did not lie in tenure; and as trusts are now what uses were before the stat. 27 Hen. VIII., it was determined, in the following case, after great consideration, that a trust estate is not liable to escheat; but that where *cestui que trust* dies without heirs, the trustee shall retain the lands for his own benefit.

A Trust
Estate does
not escheat.

Tit. 12. c. 1.

29. Elizabeth Gunning, being seised of certain lands in fee simple, *ex parte paterna*, married Nicholas Harding; but previous thereto, in 1695, a settlement was made of her estate, to the use of Nicholas Harding for life, remainder to Elizabeth Gunning for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male, remainder to the right heirs of Elizabeth Gunning.

Burgess v.
Wheate,
1 Black. R.
123.

There being no issue male of the marriage, an indenture was made in 1718, between Harding and his wife of the one part, and Sir Francis Page and R. Simmons of the other part, reciting the settlement of 1695, and covenanting to levy a fine, to assure the premises to the use of the daughters of the marriage, as tenants in common; and in default of such issue, to Sir Francis Page and Simmons, and their heirs, in trust for the said Elizabeth Harding, her heirs and assigns; to the intent that she might, at any time, during her life, without her husband's concurrence, dispose of the reversion to such uses as she should, by her will, or other writing, appoint; and a fine was accordingly levied.

There was no daughter of the marriage. The wife survived her husband, but died without making any appointment, and without heirs on the part of her

father. Burgess, the plaintiff, was her heir on the part of the mother.

After the death of Elizabeth Harding, Sir Francis Page, who survived Simmons, got into possession; and, in July 1739, Burgess filed a bill against him, praying, that if he had any legal interest in the premises, he should be compelled to convey it to Burgess. Sir Francis Page, by his answer, insisted that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

The Attorney General, on behalf of the Crown, filed an information in Chancery, insisting that Sir Francis Page, by the deed of 1718, had no beneficial interest in the estate, in his own right, but was a mere trustee for the benefit of Mrs. Harding, or her appointee or heir; and in default of such appointment, or heir, that he was a trustee for the benefit of his Majesty, who stood in the place of such heir. That the premises were escheated, and the representatives of Sir Francis Page ought to convey to the use of his Majesty.

The case was argued before Lord Keeper Henley, assisted by Lord Mansfield and Sir Thomas Clarke, Master of the Rolls.

Sir Thomas Clarke said, the great question was, whether the Crown had a right to a conveyance of the legal estate from Mrs. Harding's trustee, as an equitable escheat, by the death of Mrs. Harding without heirs on the part of the father. He should consider the right of escheat in three lights. 1. In what situation it stood in respect to a conveyance at common law, before the invention of uses. 2. In what situation it stood with respect to a conveyance to uses, before the statute of uses was made. 3. How it stood since that statute, and now with regard to

trusts. The result and application of the whole would decide the question, how far the Crown was or was not entitled in equity to a conveyance from the trustee.

1°. An escheat was in its nature feudal ; a feud was the right which the tenant had to enjoy the lands, rendering to the lord the services reserved by the contract. On the other hand, an interest remained in the lord, after the grant made, called a seignior, consisting of a right to the services of the tenant, and to the land itself, on the expiration of the grant, as a reversion ; which was afterwards called an escheat. As the grant was more or less extensive, the reversion was more or less remote ; for feuds were sometimes temporary, sometimes hereditary, and a temporary one ended on the grantee's death.

Sir H. Spelman only took notice of hereditary feuds, nor did our laws : and though it might seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee simple originally, in the sense in which it was now used : but only an estate to be enjoyed *ut merum beneficium*, without power of alienation, in prejudice of the heir or the lord ; the heirs took it successively as an usufructuary interest ; and in default of heirs, the land escheated, or strictly speaking, reverted. If there was an heir, and by legal impediment he could not take, the land escheated. When a power of alienation was introduced, first with the licence of the lord, and afterwards without such licence, the right of escheat became more remote ; and when a power of charging or incumbering the feud was given to the tenant, the lord took the escheat subject to the incumbrance. This power was more prejudicial to the right of escheat than the power of alienation ; for that only

Bract. 23 a.
46 Edw. III.
pl. 4.
Bro. Ab. Tit.
Escheat, 2.

Bract. 382 a.

changed the lord's chance, but the incumbrances defeated the right of escheat as far as they went.

Bro. Uses,
pl. 10.

Vide Tit. 11.
c. 2, § 41.

2°. Upon the introduction of uses, two distinct kinds of property might be acquired in land; the legal estate and the use. *Cestui que use* was no longer tenant at law, nor was the land subject to his incumbrances. But though the land was not liable at law on account of the *cestui que use*, yet it was still liable on account of the feoffee to uses.

This being found extremely inconvenient, a variety of statutes were made to restore the fruits of the tenure to the lord, against the *cestui que use*, as relief, wardship, &c.; but no statute was made to restore the loss of the escheat; which, as Sir H. Spelman observes, is not only the fruit of the tenure, but the very tree itself.

3°. Thus stood the law till the statute of uses united the use and the legal estate: but as the courts of law determined that there were some uses to which the statute did not extend, they were called trusts, and succeeded to uses, *aliusque et idem nascitur*. The Court of Chancery having taken cognizance of trusts, adopted, in the construction of them, all those rules by which uses had been governed before the statute. The case of curtesy was the only exception; and that seemed to have prevailed unaccountably, and against the opinion of the Judges themselves.

Before the statute of uses, if a *cestui que use* was attainted of treason or felony, the lord could not have the land, but the feoffee might retain it to his own use. 5 Edw. IV. pl. 18. fo. 7 b. was an authority in point against the lord's claim, and questions who should have. If the lord was at law entitled to an escheat on death without heirs, or attainder of feoffee to uses, and not on death, &c. of *cestui que*

use, it strengthened the authority of the case. That if it had been determined otherwise, in favour of the lord, it would have given him a double chance for his escheat.

Brook, pl. 34. agrees, the lord shall not have it, nor the heir, by reason of corruption of blood; and that feoffee shall retain it to his own use, And though this was introduced by an *ideo videtur*, in a modest manner, yet many of his opinions were so introduced, and had generally been thought of great authority. From this it was clear, that if Mrs. Harding had been *cestui que use*, and attainted of treason or felony, the lord would not be entitled to escheat; and if trusts in equity were analogous to uses at law, and he thought they were, neither would the Crown be entitled in the case of a trust in equity.

Sir G. Sandes's case was in point; and that and the case in 5 Edw. IV. mutually strengthened each other.

Att. Gen.
v. Sandes,
Tit. 12. c. 2.
§ 28.

It had been said, if the legal estate had escheated to the Crown for want of an heir to the trustee, it would in equity have been liable to the trust; but this position was not proved by any authority. And if it were true, why ought the lord to have a reciprocal equity on the death of the *cestui que trust*, without heirs? Upon the whole, his opinion was (to use the words of Sir Joseph Jekyll), that the title of the trustee should not have been set up, but it was so; it appeared a plain and subsisting one. The law was clear; and courts of equity ought to follow it in their judgement concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue.

Lord Mansfield said, he would follow the method used at the Bar, under the four following heads:
1°. The nature of trusts of land, and the rules that

governed them. 2°. The nature of that right by which the King claimed in this case. 3°. Whether, if the trustee had died without heir, the King must not in that case have taken the land, in a court of equity, subject to the trust. And, 4°. Apply the result of the inquiry, as between the King and the trustee, to the particular point immediately in judgement.

1° As to the nature of trusts of land, and the rules by which they were governed. By an inquiry into the nature of an use or trust of lands, no more was or could be meant, than to find out historically on what principles courts of equity, before the statute 27 Hen. VIII. interfered in modifying or giving relief in rights or interests in lands, which could not be come at but by suing a *subpœna* : and what courts of equity now did in modifying, directing, and giving relief in cases of trusts, where there was no other remedy but by bill. Whoever showed that the relief then given was more extensive ; that it was considered by different or opposite rules ; that the right was considered in different or opposite lights, would show the difference and contrast between uses and trusts. The opposition was not from any metaphysical difference in the essence of the things themselves ; an use and a trust might essentially be looked upon as two names for the same thing ; but the opposition consisted in the difference of the practice of the Court of Chancery. If uses before the statute 27 Hen. VIII. were considered as a pernaney of the profits, as a personal confidence, as a *chose in action*, and now trusts were considered as real estates, as the real ownership of the land, so far they might be said to differ from the old uses ; though the change might not be so much in the nature of the thing, as in the system of law by which

it was regulated. The old law of uses did not conclude trusts now; where the practice was founded on the same reason and grounds, it was still followed; but its positive authority did not bind, where the reason was defective; more especially that part of the old law of uses which did not allow any relief to be given for or against any estates in the *post*, did not now bind by its authority in the case of trusts.

Trusts, from the nature of the thing, might be left to the honour and faith of the trustee; in that case they were not the objects of law, otherwise than as they might be fraudulent and void in respect to third persons; or a court of justice might take cognizance or compel the execution of them: in that case trusts only retained the name in substantial ownership, the disposition in trust became the mere form of a legal conveyance. Trusts in England, under the name of uses, began, as they did in Rome, under no other security than the trustee's faith; they were founded in fraud, to avoid the statutes of mortmain. Trusts were not on a true foundation till Lord Nottingham held the great seal; by steadily pursuing trusts from plain principles, and by some assistance from the legislature, a noble, rational, and uniform system of law had been raised: trusts were made to answer the exigencies of families, and all other purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid. The *forum* where they were adjudged was the only difference between trusts and legal estates: trusts in the Court of Chancery were considered, as between the *cestui que trust* and trustee, as the ownership and as legal estates; whatever would be the rule at law, if it was a legal estate, was applied in equity to a trust estate. Trust estates were liable to

curtesy : the case of dower was the only exception ; and not in law or reason, but because a wrong determination had misled, in too many instances to be altered and set right ; and if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of a trust estate.

Cashborne v.
Inglis,
Tit. 15. c. 3.
§ 11.

In the eye of the Court of Chancery, Lord Hardwicke thought the equity of redemption was the fee simple of the land : that it would descend, might be granted, devised, entailed ; and that equitable entail might be barred by a common recovery. This proved it was considered in Chancery as an estate whereof there might be a seisin, for without such a seisin a devise of a trust could not be good.

The allowing curtesy of a trust was founded on the maxim that equity follows the law ; which was as safe as well as a fixed principle, for it made the substantial rules of property certain and uniform, be the mode of following it what it would. It followed, from the great authority of this determination, on clear law and reason, that the *cestui que trust* was, in the consideration of Chancery, actually and absolutely seized of the freehold.

To conclude this head, an use was originally understood to be merely an agreement by which the trustee, and all claiming in privity under him, were personally liable to the *cestui que trust*, and all claiming under him, in like privity. Nobody in the *post* was entitled under, or bound by the agreement ; but now the trust in Chancery, was the same as the land, and the trustee was therefore considered merely as an instrument of conveyance ; he was in no event to take a benefit. The trust must be co-extensive with the legal estate ; and where it was not declared, it resulted by necessary implication, because the trustee

was excluded; except where the trust was destroyed by a conveyance to a purchaser, without notice, for a valuable consideration.

The trustee could transmit no benefit: his duty was to hold for all those who would have been entitled, if the limitation had not been by way of trust. There was no distinction now between those in the *per* and the *post*, except in the case of dower, which was not founded on reason, but on practice.

As the trust was the land in Chancery, so the declaration of trust was the disposition of the land; and therefore an essential omission in the legal disposition, should not destroy the trust.

The grounds why the lord by escheat neither took, nor was subject to, an use, did not now subsist. The principles upon which the question must now be argued, had no relation to it, which ever way it ought to be determined; or rather, none of those principles were made or could ever be considered in the law of uses; for the Court of Chancery never interposed in cases where the claim was in the *post*, and for that reason it was taken for granted, in Edward IVth's time that the lord should not have it.

2. This brought him to consider the nature of the right by escheat.

It had been truly said, that on the first introduction of the feudal law, this right was a strict reversion; when the grant determined by failure of heirs, the land returned, as it did upon the expiration of any smaller interest: it was not a trust; but the extinction of the tenure: as Mr. Justice Wright said, it was the fee returned.

This distinction held equally, whether the investiture was to special or general heirs; for originally the tenant could not alien in any case, without the

lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what in point of law amounted to a consent to a new investiture, or change of his vassal: this was the meaning of what was said in the books, that nothing escheated, where the tenant was in by title.

As soon as a liberty of alienation was allowed, without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres*; but the resemblance of the lord's right by escheat, to that of the heir by descent, did not hold throughout; and therefore Sir Edward Coke, with great accuracy, considered the lord by escheat as assignee in law. He took no possibility, or condition, or right of action, which could not be granted; he could not elect to avoid voidable acts, as a feoffment of an infant, with livery; but every right preserved to the heirs, which could be granted, went to the lord by escheat, as a rent reserved to the tenant and his heirs.

1 Inst. 215.

ante.

In the case of *Thruvton v. Att. General*, the benefit of a trust term was decreed to the King, taking by escheat, because it was to go with the inheritance, by the express limitation of the parties.

3°. Whether, failing heirs of the trustee, the King must not in this case have taken the estate in a court of equity, subject to the trust.

This seemed to be a very material consideration; for if the King was not to be subject to the trust, there was no colour that he should claim the trust by escheat. That land escheated should be subject to the trust, appeared to him to be most consistent with the King's right, whether the escheat were considered as a reversion, as it once was, or as a caducary succession *ab intestato*, as it then substantially was. The

King could not claim by escheat, contrary to the terms or conditions which the tenant held under: from which two things followed: 1st. That there was equity against the King; and, 2dly, That the lord was bound as much, in a court of equity, by the equitable terms of his investiture, as he was in a court of law by the legal terms. Taking the estate as a caducary possession, the lord could only take *ab intestato*, absolutely; so far as the tenant had not disposed of the estate, he could take, and no farther. The tenant's power of disposing was absolute, without the lord's privity, without any determined form of conveyance. The trustee had, by his declaration of trust in 1718, made a valid conveyance of his trust in equity; and therefore a court of equity could not, he apprehended, suffer the land to go as undisposed of by the tenant; because, in the consideration of Chancery, there was a valid disposition made by him; but even at law, the escheat would not be free from the trust. The statute of frauds made a trust estate assets in the hands of the *cestui que trust*; consequently, for that purpose, the estate descended to the heir.

In 18 Cha. II. before trusts were put on the rational footing they were now, the apprehension of the Judges was, that the lord by escheat ought to be subject to the trust. Lord Bridgeman thought so in 1702. Sir John Trevor certainly knew there could be no escheat of an use. If it was not to be subject to the trust, he thought the inconvenience would be very great: and where they were not tied down by any erroneous opinions, which had prevailed so far in practice that property would be shook by any alteration of them, arguments of convenience and inconvenience were always to be taken into consideration. Almost all the great estates in England were now

limited in trust; the trustees were men of business, probably concerned for the family, and at a little distance of time their pedigrees were not to be traced; and if the surviving trustee was to die without heir, it would be thought hard, if the estate should be lost. But he rested upon this,—it seemed to be a contradiction in terms, that he who had no claim but *ab intestato*, where the owner had not disposed of his property, should take contrary to, and in prejudice of his disposition.

An escheat was now as much a title under the former owner, in consequence of his former seisin, as that of the heir. Why else should the lord be deemed the assignee or heir of the tenant? He thought the lord might be considered as much his heir as the heir by blood, and was as much liable to all his dispositions.

4°. If what he had said was right, little was left for him to say on this head. If the lord took an escheat as heir or assignee in law, then the King was within the express declaration of trust, which was, to Elizabeth Harding her heirs and assigns. And upon the whole, he thought the King was entitled to a decree.

The Lord Keeper said, The question on the information was, whether *cestui que trust* dying without heirs, the trust was escheated to the Crown, so that the lands might be recovered in a court of equity by the Crown; or whether the trustee should hold them for his own benefit. He should consider, 1st, The right of lords to escheat at law. 2dly, Whether they had received a different modification in a court of equity. 3dly, The arguments used in support of the information: and, from the whole, draw a conclusion that the Crown had no equity.

1°. The legal right of escheat arose from the law of enfeoffment to the tenant and his heirs; and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, was accurately traced in a treatise of tenures by a learned hand. This reduced the condition of the reversion to this single event, *ob defectum tenentis de jure*. The lord became entitled to the land by escheat, in lieu of his services. The books were uniform, that in the case only of the tenant's dying without heir, the escheat took place: as long as the tenant, or his heir, or any other person, by his implied assent, continued in possession by title, that prevented the escheat. This showed, that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had right died without heirs, yet the escheat was prevented; for if the lord had a tenant to perform the services, the land could not revert in demesne.

Sir Martin Wright.

1 Roll. Ab.
816.
1 Inst. 268 b.

Upon these cases he would observe, that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised; because in every one of these cases, they all came in without the lord's consent; unless it could be said that the lord was a virtual assenter, as well to the disseisins, as to the legal conveyances; and if that were so, it would operate to the establishing the right of the trustee in Chancery, who would say he was entitled, under a conveyance in law, by the very consent of the lord, which was a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord a right to the escheat.

2°. The next consideration was, whether a court of equity could consider it in a different light: now when the tenant did not die seised, and a proper legal tenant by title continued, could the Court of Chancery say to the lord, your seigniorship is extinguished; and to the tenant, your tenancy is so too; though both were legal rights, then subsisting at law.

In consideration of uses, with regard to escheats, equity had proceeded on the same principle as law, where there was a tenant of the land, who performed the services; and he did not find the Court had any regard to the *merum jus* of the tenant. Now, the reason why there was no escheat on the death of *certain que use*, in equity, seemed to be this, (and it was a reason equally applicable to uses and trusts,) that the Court had nothing to issue a *subpoena* upon, no equity, nothing to decree upon; and every person must bring an equity with him for the Court to found its jurisdiction. It seemed to him, he could have no equity in the case of an use, or as owner of the trust, for this plain reason; an use before the statute could not be extended further than the interest in the estate which the creator of the use could have enjoyed. As if the creator of the use had a fee simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land. If he made a feoffment, and declared no uses, it resulted to him in fee, which was to him, his heirs and assigns. The consequence was, that the moment he died without heirs or assigns, there was no use remaining. How then could you come to Chancery for a *subpoena*, (whether he took back the same or a different use) to execute an use or trust which was absolutely extinct?

That seemed to him the plain and substantial reason why, in the present case, whether it was an use or a trust, there was no basis on which to found a *subpana*. The Lord Chief Justice's system was very great and noble, and very equitably intentioned; such a system as he should readily lay hold of upon every occasion, if he thought he could do it consistently with the rules of law. Where a person passed the estate without consideration, there, in modern language, an use resulted; because it was unequitable that a man should have an interest in the estate, when he had paid no consideration for it. But where a person was not party to the deed, nor privy to the estate, he did not see how any thing could result for his benefit. That this was the notion in respect to an use, appeared from authorities. The law was, that the lord could not have the escheat of an use; so was 5 Edw. IV., for he took that to be the report of a ante. case; then it had all the authority the Year Books carried with them: and this had been adopted by all the writers since. Bacon, 79, did not question the Bac. Read. 12. edit. 1785. authority of that case: he gave a reason of his own, which he substituted as a better than that in the books; that there was a tenant in by title, which was a strong reason in law; but he did not mention that as a reason, with regard to the *subpana*. It was not a conclusive reason that the lord should not have a *subpana*, because there was a person in possession: he should have it for that reason, if that person was liable to him in equity: therefore he gave a better reason; because, says he, it never was his intent to advance the lord, but his own blood. Therefore that was the reason; it would not be within the intention of that trust, that any beside the blood of the covenantor should take. Nobody could imagine the tenant

intended to provide a trust, to answer the lord's escheat. Mrs. Harding never thought of escheat, he supposed; but had it been suggested to her, if she died without heirs that could possibly take her estate, would she rather have the friend she had chosen to make her trustee have it, or that it should go to the King; she must have been a subject of more zeal than he could suggest, if she had said she would give it to the King.

As he was stating the law of escheats with regard to uses and trusts, he would take notice of an objection that seemed equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts: that was the dilemma which was urged at the bar, as the basis of the equity in this case, though he did not think it a necessary dilemma; viz. that the lord must have the estate by escheat, either on the death of the *cestui que trust* without heirs, or of the trustee without heirs, discharged of the trust; but if he could not have it while the trustee lived, while there was a tenant, it would be monstrous that the *cestui que trust* should be prejudiced by putting the estate in the trustee's hands for the benefit of the family. One part of this was a dangerous conclusion, the other was not; his answer was, that if the law were so, that the lord should in that case take it discharged of the trust, he must suppose it no injury or absurdity at all: *volenti non fit injuria*. The creator of the trust determines to take the convenience of the trust, with its inconvenience. It was most certain every man who created a trust put his estate in the power of his trustee: if the trustee sold it for a valuable consideration, without notice, no Court could relieve the owner from this misfortune, it was the result of his own act; and yet that was as shocking a perfidy in the trustee as

could be ; but the Court could not interpose, as it would affect the rights of others, of third persons. But he did not think this was at all a necessary dilemma. The lord might not be entitled on the death of *cestui que trust* without heir, because there was no equity, for he had a tenant, as he had before ; but possibly there might be an equity the other way against the lord : for if the trustee died without heir, and the lord had the estate, the Court of Chancery might say, you shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestui que trust*.

A difference was attempted to be made between uses and trusts ; but by comparing the definitions of the two, it would appear they were precisely the same. It was said the difference consisted in this, that equity had shaped them much more into real estates, than before, when they were uses ; as now there was tenancy by the curtesy of a trust ; it might be entailed ; and the entail might be barred by a common recovery. But why ? not from any new essence they had obtained, but from carrying the principle farther. *Quia equitas sequitur legem* : for as between the trustee and *cestui que trust*, the Court of Chancery had jurisdiction ; and he thought they should have equally extended the rules and principles of uses, as well as those of trusts.

That it would be a bold stroke to say, Chancery considered trusts as a mere nullity ; and that they were to be treated in the same manner as if they continued in the seisin of the creator of them, or of the person for whom they were made. Rules of property were not to be questioned, even by the Judges : while the people continued satisfied, and acquiesced

in them, none but the legislature could alter them. His objection to the claim in the information was, not that it was to have a trust executed, as if it were land; but it was to claim the execution of a trust that did not exist: if there was a trust, he should consider it merely as an estate, and determine accordingly; but the creation of a trust never could affect the right of a third person.

He could assign but one reason why that distinction between tenancy by the curtesy and dower had prevailed, and it was applicable to the reason of this case. He had heard the House of Lords were startled at the distinction: they were told the opinion of conveyancers was so; and that if it was altered, it might load purchasers with dower, who thought they had purchased free from it; and the Lords would not reverse the judgement, because they would not let it affect the right of a third person. It appeared that at law there could be no escheat, while there was a tenant *de jure*; in equity there could be none while trusts were called uses; and a trust and an use were exactly the same. How then could he say the lord should lose his escheat, when any man, for his own convenience, put his estate in trust. It seemed, if he were to do so, that he would *give* law and equity, and not *pronounce upon* law and equity.

Two centuries had passed since uses and trusts had been admitted, and he could not find a *dictum* that the Crown should have an escheat of a trust.

Tit. 12. c. 2. The judgement in Sir George Sandes's case, being an authority in point, great efforts were made to weaken its validity. But Lord Hale had determined on great principles of law; and he could not help remarking, that neither the bar nor the bench were

ever frightened at the ill consequences which had been mentioned. The information on the part of the Crown was dismissed.

30. In a subsequent case Lord Thurlow said,—*Burgess v. Wheate* was determined upon divided opinions, and opinions which continued to be divided, of very learned men. The argument of the defect of a tenant seemed to be a scanty one. Whether that case was such a one as bound only when it occurred *specialim*, or afforded a general principle, was a nice question.

Middleton
v. Spicer,
1 Bro. R.
201.
Hargrave,
Juris. Exer.
vol. 1. 383.

31. An equity of redemption is considered as not liable to escheat; and in the case of *Burgess v. Wheate*, the Lord Keeper said, "If a mortgagor die without heir, shall the mortgagee hold the land free? I answer, shall it escheat to the Crown? No; because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the Crown has not an equity, on which to sue a *subpœna*."

Noran Equity
of Redemp-
tion.
1 Black. R.
184.

32. Where money is directed to be laid out in the purchase of land, but the quality of real estate is not imperatively and definitively fixed upon it, by the instrument; and it remains *ad arbitrium* whether it is to be considered as land, or money; it has been held by the Court of Chancery, that on failure of heirs, the Crown has no equity, against the next of kin, to have it laid out in real estate, in order to claim the escheat.

Nor Money
to be laid out
in Land.

Walker v.
Denne,
2 Ves. Jun.
170.

33. It has been stated, that all the lands in England are now held in socage, either immediately of the King, or mediately of some private person, by fealty and other services; which are preserved to the lord by the stat. 12 Cha. II. To the feudal lord therefore

To whom
Lands es-
cheat.
Dissert. c. 3.
§ 20.

all lands escheated belong; so that where lands are held of a manor, the escheat is to the person who is lord of that manor: in the case of a seignior in gross, they escheat to the person entitled to such seignory; and where it cannot be ascertained of whom lands are immediately held, then the King, as the great and chief lord, shall have them by escheat: for to him fealty belongs, and of him they are certainly holden by presumption of law, and without necessity of proof.

May v. Street,
Cro. Eliz.
120.

34. Those who have royal franchises, such as the Bishop of Durham, whose county is palatine, have all royal escheats, of which Lord Hale gives several instances.

1 P. C. 254.

The Lord by
Escheat may
distrain for
Rent.

1 Inst. 215 b.

35. The lord by escheat may distrain for rent due to the last tenant; as if there be lord and tenant, and the tenant makes a lease for life, rendering rent; if he afterwards dies without an heir, whereby the reversion comes to the lord, by way of escheat, he may distrain for the rent, because it is incident to the reversion: but he cannot take advantage of a condition of re-entry, because he is not heir to the lessor.

Entitled to a
Term to
attend.

36. Where the inheritance escheats, and there is an outstanding term, which is attendant on the inheritance, the lord by escheat will be entitled to such term.

Thurxton v.
Att. Gen.
1 Vern. 340.

37. A person seised in fee, limited a term for 100 years to trustees, in trust to attend the inheritance: he afterwards died without an heir, being a bastard. The question was, whether this term should go to the King with the inheritance.

It was determined that the King was entitled to the term; for he was not in, barely in the *post*, but in the *per* also; and the term for years went with the inheritance, by the express limitation of the party.

38. The lord by escheat is entitled to all the charters concerning the lands escheated; and it is said in Brooke's Ab. that if a tenant is attainted of felony, the lord shall have his lands by escheat; and also the charters; though the charters are not forfeited.

And to all Charters, &c. Tit. Charters, pl. 39.

39. The lord who acquires the land by escheat, is liable to all the incumbrances of the last tenant; thus if a person dies without heirs, having granted a rent, the lord by escheat will hold the lands subject to such rent. So if he dies leaving a wife, she will be entitled to dower; and in the case of a woman, her husband will be entitled to curtesy: for as the tenant has the power to defeat the lord's right to escheat by any mode of alienation, he must consequently have every inferior power.

Is subject to Incumbrances. 1 Roll. R. 402. 7 Rep. 7 b.

40. Where a copyhold estate escheats to the lord of the manor, he will hold it subject to any lease made by the copyholder, with the licence of the lord; and also to the free bench of the widow.

Turner v. Hodges, Hut. 102.

Lord Mansfield has said, that in all manors where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds, the lord is not bound by debts, alienation, or trusts; they are all void against him: but if he consents to a condition or trust on the court-roll, then he is bound by it; for he cannot claim against his own act: but in freeholds, the form of his concurrence not being necessary, he is always considered as much bound as if he was party to the deed of alienation which makes the trust; because the power which the tenant now has by law, is equivalent to the lord's consent to the grant, when it was a strict reversion.

1 Black. R. 167.

Was not
bound to
execute a
Use.

Tit. 11. c. 2.
§ 12.

Is not sub-
ject to a
Trust.

47 Geo. III.
c. 29. *infra*,
Tit. 34.

pa. 67.

Prec. in Cha.
200.

Juris. Exer.
vol. 1. 390.

41. The reason that the lord by escheat is subject to incumbrances is, because they are annexed to the possession of the land, without respect to any privity: but the lord who comes in by escheat is not subject to any incumbrances annexed to the privity of estate; for he comes in, in the *post*, therefore was not bound to execute a use, his title being paramount, namely, by force of the condition in law tacitly annexed to the land, at the time of the creation of the seignior, which he had to his own use.

42. It follows, by a strict analogy from the case of a use, that the lord by escheat is not bound to execute a trust. In the case of the Crown, it is laid down in all the books that the King could not be seised to a use; therefore cannot be a trustee for any one: and that where the King acquires land by escheat, he is not compellable to execute a trust, appears from a modern statute, 39 & 40 Geo. III. c. 88. § 12., by which the Crown is enabled to direct the execution of any trusts to which lands escheated are liable, and to make any grants of such lands.

43. With respect to private persons, Carter reports Lord Bridgeman to have said, that where a man conveys land in trust, and the trustee is attainted of felony, the lands shall be forfeited; though the *cestui que trust* may have relief in equity. And Sir J. Trevor, M. R. lays it down, that if a trustee dies without heir, the lord by escheat shall have the land; yet subject to the trust in equity.

Mr. Hargrave has controverted these authorities. As to the first, he says he was in possession of Lord Bridgeman's own manuscript reports of his judgments whilst he was Chief Justice of the Common Pleas: compositions far exceeding Carter's account

of the judgements, in copiousness, depth, and correctness: in which there was not an *iota* which in the least imported an opinion, that upon escheat the lord comes in subject to any trust: and as to the second, the opinion seemed too much of a loose *dictum* to command much attention.

44. In a case determined in 17 Cha. II., where a person seised in fee contracted to sell his estate, and died before assurance, without any heir, so that the lands escheated to the lord, the Court refused to compel the lord to convey to the vendee; which could only be upon the principle that the lord by escheat was not compellable, in equity, to execute a trust.

Stevens
v. Bailey,
Nels. 107.

45. It is said by Lord Macclesfield, that if a trustee of a copyhold dies without heir, the lord becomes entitled by escheat, without being subject to the trust.

1 Stra. 454.
Williams v.
Lonsdale,
3 Ves. Jun.
752.

46. There were formerly officers called escheators, whose duty it was to find offices after the death of the King's tenants, and to certify their inquisitions into the Exchequer. These offices have long since ceased; and now, where a person is supposed to have held his lands of the Crown, and to have died without heirs, a commission of escheat is issued to ascertain the facts.

Office of
Escheator.
1 Inst. 13 b.
4 — c. 43.

47. In a modern case, Lord Eldon said it was usual for the Crown to give to the person making discovery of an escheat as good a lease as it could.

Doe v. Red-
fern, 12 East,
96.

Ex parte
Webster,
6 Ves. 809.

7 Ves. 71.
Vide Tit. 34.

TITLE XXXI.

PRESCRIPTION.

CHAP. I.

Prescription by immemorial Usage.

CHAP. II.

Of the Statutes of Limitation.

CHAP. I.

Prescription by immemorial Usage.

- | | |
|--------------------------------------|--------------------------------------|
| 1. Origin of Prescription. | 26. And have a continued Usage. |
| 6. Prescription by immemorial Usage. | 29. And be certain and reasonable. |
| 10. What may be claimed by. | 37. How a Prescription may be lost. |
| 22. Must be beyond Time of Memory. | 44. Descent of prescriptive Estates. |

SECTION 1.

Origin of
Prescription.

BY the law of nature, occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself; and to every thing annexed to, or issuing out of it. Hence possession was the first act from which the right of property was derived: it has therefore been established as a rule of law, in every civilized country, that a long and continued possession should give a title to real property.

2. This mode of acquisition was well known in the Roman law by the name of *usucapio*; because a person who acquired a title in this manner, might be said, *usu rem capere*. And is thus defined by *Modes- tinus*.—*Adjectio dominii per continuationem possessionis temporis lege definiti*. In the English law it is called prescription.—*Prescriptio est titulus ex usu et tempore substantiam capiens, ab auctoritate legis*. Vin. ad Inst. Lib. 2. Tit. 6. l Inst. 113 b.

3. Every species of prescription by which property is acquired or lost, is founded on this presumption, that he who has a quiet and uninterrupted possession of any thing for a certain number of years, is supposed to have a just right; without which he could not have been suffered to continue in the enjoyment of it. For a long possession may be considered as a better title than can commonly be produced; as it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason for which the claim was forborne. Domat. vol. 1. 461.

4. The doctrine of prescription appears to have been very soon established in England. And from what is said of it in Bracton, seems to have been derived from the Roman law; for he lays it down, that a title may be gained both to corporeal and incorporeal hereditaments by a long and uninterrupted possession.—*Dictum est in precedentibus qualiter rerum corporalium dominia ex titulo, et justa causa acquirendi, transferuntur per traditionem. Nunc autem dicendum qualiter transferuntur sine titulo, per usu captionem; scil. per longam continuam et pacificam possessionem, ex diuturno tempore, et sine traditione*. Lib. 2. c. 22.

5. Our legal writers, however, have only allowed prescription to operate in the case of incorporeal hereditaments; such as rights of common, rents, &c., where the person who claims can show no other title

than that he, and those under whom he claims, have immemorially used to enjoy them. But there is another kind of prescription established by the statute law, extending to corporeal hereditaments, by which an uninterrupted possession, for a certain number of years, will give the possessor a good title, by taking away from all other persons the right of entering on such hereditaments, or of maintaining any species of action for them.

Prescription
by immemo-
rial Usage.

6. There are, therefore, two kinds of prescription known to the English law. First, a prescription to incorporeal hereditaments by immemorial usage; as where a person shows no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it; which may be called a positive prescription.

1 Inst. 113 b.
4 Rep. 31 b.

7. A prescription by immemorial usage differs from custom in this respect, that a custom is properly a local usage, not annexed to the person; such as the custom that all the copyholders of a manor have common of pasture upon a particular waste. Whereas prescription is always annexed to a particular person.

May be in
the Person
or the Estate.

1 Inst. 113 b.
121 a.

8. This kind of prescription is of two sorts. Either it is a personal right, which has been exercised by a man and his ancestors, or by a body politic and their predecessors; or else it is a right attached to the ownership of a particular estate, and only exercisable by those who are seised of that estate. In the first case, it is termed a prescription in the person; in the second case, it is called a prescription in a *que estate*.

6 Rep. 60 a.

9. A prescription in a *que estate* must always be laid in the person who is seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, cannot prescribe in this manner, by reason of the imbecility of their estates; for, as prescription is

always beyond time of memory, it would be absurd that those whose estates commenced within the memory of man, should pretend to prescribe for any thing. Therefore, a tenant for life must prescribe under cover of the tenant in fee simple, and a copyholder under cover of his lord.

10. Prescription by immemorial usage only extends to incorporeal hereditaments; such as commons, ways, waifs, estrays, wreck, warren, &c. But it cannot give a direct title to lands, or other corporeal inheritances, of which more certain evidence may be had. What may be claimed by.

11. Nothing, however, can be claimed by prescription, which owes its origin to matter of record. For prescription being only an usage in *pais*, does not extend to those things which can only be had by matter of record; such as goods and chattels of traitors, felons, and fugitives, deodands, &c. But to treasure trove, waifs, estrays, wrecks, park, warren, royal fishes, fairs, markets, and the like, a title may be made by prescription. Tit. 27. § 83.
1 Inst. 114 a
5 Rep. 109 b.

12. A prescription by immemorial usage can in general only be for things which may be created by grant; for the law allows prescriptions only in supply of the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning; and allows such usage for a good title: but still it is only to supply the loss of a grant. Therefore, for such things as can have no lawful beginning, nor be created at this day, by any manner of grant, or reservation, or deed, that can be supposed, a prescription is not good. 1 Vent. 387.

1 Inst. 114 b.

13. A person may have frank foldage by prescription, but it must be appendant to land; and a man may prescribe that he and his ancestors, time out of mind, have had frank foldage of the beasts of his tenants, in a particular place.

Jeffry at
Hay's Case,
8 Rep. 125.

14. In trespass, the defendant justified under a prescription, that the lords of the manor of H. had, and always used to have, free foldage throughout the vill of H., and to have the penning of the sheep; so that the vill of H. ought not to have free foldage, without the consent of the lord; and that if any levied a fold, without such consent, the lord had used to abate it.

Punsany
v. Leader,
1 Leon. 11.

It was urged, that this prescription was void, being against common right, which gave every one foldage in his own land. *Sed non allocatur*, for every prescription is against common right; and it did not extend to deprive the owner of the whole interest and profit of his land, which would not have been good; but only precluded him from setting up hurdles, which was a reasonable prescription, and restrained a particuler profit only.

15. In a modern case it was held, that an ancient grant without date does not necessarily destroy a prescriptive right; for such grant may either be prior to the time of memory, or in confirmation of such prescriptive right.

Addington
v. Clode,
2 Black. R.
989.

16. In trespass the defendants pleaded, that Clode was seised of a messuage, &c.; that he and all those whose estate he had, &c. for the time being, had and used, and had been accustomed to have and use, and so still of right ought to have and use, common of pasture in the place where, &c. for all commonable cattle, *levant and couchant*, &c.; and thereupon justified.

The plaintiff traversed the right of common, and produced two ancient charters, without date, containing a grant of common.

The Judge being of opinion that these grants were inconsistent with the plea of prescription, a verdict was given for the plaintiff.

Upon a motion for a new trial, it was urged for the defendant, that these grants might only be in confirmation of an antecedent prescriptive right; and then were not inconsistent with it.

The Court was of opinion, that these grants might either be before time of memory, or else they might have been only in confirmation of a prior right: in neither of which cases would they have been inconsistent with a plea of prescription. It ought to have been left to the jury to decide whether either of these was the case. A new trial was granted.

17. An easement, which is a service or convenience that one neighbour hath of another, without profit, as a way through his land, a sink, or such like, may be claimed by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom.

Kitch.
Courts, 105 b.

18. There can be no prescription for what the law gives of common right: therefore a lord of a manor cannot prescribe to have a court baron within his manor; because it is of common right, and incident to a manor. But a lord of a manor may prescribe to enlarge the jurisdiction of his court.

Pill v.
Towers,
Cro.Eliz.791.

19. Where a person prescribes in a *que estate*, he can claim nothing under such prescription but what is appendant or appurtenant to land; for it would be absurd to claim any thing as the consequence of an estate, with which the thing claimed has no connexion.

Lit. § 183.

1 Inst. 121 a. 20. A person cannot prescribe for any thing in a *que estate* that lies in grant, and cannot pass without deed or fine ; but in him and his ancestors he may, because he comes in by descent, without any conveyance.

§ 310. 21. Although prescription in general only extends to incorporeal inheritances, yet Littleton says, tenants in common may be by title of prescription : as if the one and his ancestors, or they whose estate he hath, in one moiety, have holden in common the same moiety with the other tenant, who hath the other moiety, and with his ancestors, or with those whose estate he hath, undivided, for time out of mind.

Lord Coke observes on this passage, that it is founded on good authority ; but that joint tenants cannot be by prescription, because there is a survivorship between them, though not between tenants in common.

Must be beyond Time of Memory.
Lit. § 170.
1 Inst. 115 a.

2 Comm. 31.
note.

22. There are two circumstances necessary to form a prescription. First, time whereof the memory of man runneth not to the contrary ; which has long since been ascertained, by the law, to commence from the beginning of the reign of King Richard I. : though it seems extraordinary that the date of legal prescription should continue to be reckoned from so remote a period.

1 Inst. 115 a. 23. This time is understood, not only of the memory of any man living, but also of proof by any record or writing to the contrary : for if there be any sufficient proof by record, or writing, although it exceed the memory or proper knowledge of any man living, yet it is within the memory of man : for memory or knowledge is twofold ; first, knowledge by proof, as by record or sufficient matter of writing ; secondly, by a man's own proper knowledge.

24. It follows, that where there is any proof of the commencement or origin of a right, since the time of Rich. I., it cannot be claimed by prescription.

25. A vicar endowed *de minutis decimis* in the year 1310, sued the parson appropriate for them. It was held that the parson could not prescribe against this endowment, though it was 300 years past; for the prescription ought to commence since the endowment, which was subsequent to the time of limitation.

Pringe
v. Child,
2 Roll Ab.
269.

26. Every prescription must have a continued and peaceable usage and enjoyment: for if repeated usage cannot be proved, the prescription fails. But where a title has once been gained by prescription, it will not be lost by any interruption of the enjoyment of it for ten or twenty years.

And have a
continued
Usage.
1 Inst. 113 b.

27. Thus, if a person has a right of common by prescription, and he takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right.

Idem.

28. Formerly a person might have prescribed for a right, though the enjoyment of it had been suspended for an indefinite time: but this is now altered, as will be shown in the next chapter.

29. A prescription must be certain; therefore a prescription to pay for tithes a penny or *thereabouts*, for every acre of arable land, is bad. It must also be reasonable: thus a prescription for setting out tithes, without the view of the parson, is void; as being unreasonable.

And be cer-
tain and
reasonable.
2 Roll. Ab.
265.
Hob. 107.

30. A prescription may however be reasonable, though it be unusual or inconvenient; as, for a person to have a way over a church-yard, or through a church.

2 Roll. Ab.
265.

Dowell v.
Sanders,
Cro. Ja. 491.
446.

31. A person cannot prescribe to do a wrong, or any thing that would be a nuisance to others; as to erect a dove-cote or pigeon-house on his lands, if it be a nuisance; or to lay logs of wood in the highway, and suffer them to continue there for a long time; for this is also a nuisance.

1 Inst. 115 a.

32. There can be no prescription against an act of parliament; because that is the highest proof and matter of record in law: but a man may prescribe against an act of parliament, when his prescription is saved or preserved by another act of parliament.

Idem.

33. Lord Coke says, there is a diversity between an act of parliament in the negative, and in the affirmative; for an affirmative act does not take away a custom. Moreover, there is a diversity between statutes that are in the negative: for if a statute in the negative be declaratory of the ancient law, that is, in affirmance of the common law, there, as well, a man may prescribe or allege a custom against the common law; so a man may do against such statute; for *consuetudo privat communem legem*.

Idem, note.

34. Mr. Hargrave has observed upon the above passage, that this appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament; consequently its operation should not be extended to the destruction of prescriptions and customs, which were before allowable. As to the use of negative words in such a case, they might either arise from the subject, or be a mode of expressing what the common law was; in either of which cases, there could not be any colour of reason for giving more effect to negative, than belonged to affirmative words. In short, to say that a statute merely declaratory of the common law, being ex-

pressed in negative words, should operate on subjects to which the common law was not applicable, seemed to be a direct contradiction: for how could a statute be merely declaratory, if it was in any degree introductive of a new law: however there were books in which Lord Coke's distinction, in respect to negative statutes declaratory of the common law, was denied. W. Jones, 270, 271. 289.

If those who opposed his opinion had meant only to say, that in the instances by which he illustrated this rule, the negative words of the statutes not only imported something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it; or that on other accounts the instances were not apt; there might possibly be some colour for their dissenting from Lord Coke: but what was professed to be controverted, was the distinction itself, which, as he understood it, seemed to be perfectly unexceptionable.

35. Lord Coke says, the statute 34 Edw. I. provides that none shall cut down any trees of his own within a forest, without the view of the forester: but inasmuch as this act was in affirmance of the common law, a man may prescribe to cut down his woods, within a forest, without the view of the forester. This doctrine has been frequently denied, but is defended by Mr. Hargrave, with his usual learning and ability. 1 Inst. 115 a.

36. A man cannot prescribe against another's prescription; for the one is as ancient as the other: thus, if a man prescribes for a way, a light, or any other easement, another cannot allege a prescription to prevent the enjoyment of it. Aldred's Case, 9 Rep. 57. 2 Mod. 105.

37. A prescription may be lost by unity of possession, of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed How a Prescription may be lost. 1 Inst. 114 b.

by such prescription, because it is an interruption in the right.

4 Rep. 88.

38. Where the subject matter of a prescription is destroyed, the prescription is lost : as if the repair of a castle be claimed by prescription, and the castle is destroyed, the prescription is lost.

Cowper v.
Andrews,
Hob. 39.

39. But no alteration in the quality of the thing to which a prescription is annexed, will destroy the prescription : as if a person prescribes in a *modus decimandi* for tithes of a park, and the park is dis-parked, yet the prescription continues ; for it is annexed to the land.

4 Rep. 87 a.

40. So, if a man has estovers by prescription to his house, although he alters the rooms and chambers of it, as to make a parlour where there was a hall, or a hall where the parlour was ; and the like alteration, of the qualities, not of the house itself ; without making new chimnies ; by which no prejudice accrues to the owner of the wood ; it is not any destruction of the prescription. Although he builds new chimnies, or makes an addition to the old house, he shall not lose his prescription ; but he cannot employ any of his estovers in the new chimnies, or in the part newly added.

Luttrell's
Case, 4 Rep.
86.

41. A person having two old fulling mills, to which was annexed, by prescription, a right to a water-course, pulled them down, and erected two mills to grind corn. It was resolved, that as the mill was the substance, and the addition demonstrated only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill, without any prejudice in the watercourse to the owner, the prescription remained.

Finch, B.1.
c. 3. § 23.

42. If a person has liberties by prescription, and after takes a grant of them by letters patent from the,

King ; this determines the prescription : for a matter in writing determines a matter in *fact*.

43. It has been stated that a prescription must *ante*, § 26. have a continual and peaceable usage and enjoyment ; therefore a prescription may be lost, by neglecting to claim or exercise it.

44. Sir W. Blackstone observes, that estates acquired by prescription are not of course descendible to the heirs general, like other purchased estates, but are an exception to the rule : for properly speaking the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*. Therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes ; the prescription in this case being a species of descent : but if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase ; for every accessory followeth the nature of its principal.

Descent of prescriptive Estates.
2 Comm. 266.

TITLE XXXI.

PRESCRIPTION.

CHAP. II.

Of the Statutes of Limitation.

- | | |
|--|---|
| 1. <i>Negative Prescription.</i> | 42. <i>And followed by an Action.</i> |
| 3. <i>Statutes of Limitation.</i> | 43. <i>Savings in the Stat. 21 Ja.</i> |
| 5. <i>As to Writs of Right.</i> | 46. <i>To what Persons and Estates these Statutes extend.</i> |
| 7. <i>As to prescriptive Rights.</i> | 49. <i>What are not within them.</i> |
| 8. <i>As to Advowries.</i> | 50. <i>Ecclesiastical Corporations.</i> |
| 11. <i>As to Writs of Formedon.</i> | 51. <i>Advowsons.</i> |
| 15. <i>As to Entry upon Lands.</i> | 52. <i>Tithes.</i> |
| 20. <i>Effect of Twenty Years Possession.</i> | 53. <i>Dignities.</i> |
| 22. <i>The Possession must be adverse.</i> | 54. <i>Rents created by Deed.</i> |
| 30. <i>A Lease postpones the Right of Entry.</i> | 57. <i>Fealty, &c.</i> |
| 35. <i>Where a second Right accrues, a new Entry is given.</i> | 58. <i>Bond Debts.</i> |
| 38. <i>The Entry must be on the Land.</i> | 59. <i>Nullus Tempus Act.</i> |
| | 63. <i>Where Equity adopts the Doctrine of Limitations.</i> |

SECTION 1.

Negative
Prescription.

THE second sort of prescription is that which arises from the several statutes of limitation; in consequence of which no action can be brought for the recovery of lands or tenements, after an uninterrupted possession of a certain number of years. It is different from the former prescription; for by that a right is acquired to an incorporeal hereditament: but by this last kind, the remedy for the recovery either of a corporeal or incorporeal heredita-

ment is taken away ; from whence it may be called a negative prescription.

2. This kind of prescription is as ancient as that which arises from immemorial usage. For Bracton says—*Longa enim possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino : quandoque unam,* 52 a.
quandoque aliam, quandoque omnem. Quia omnes actiones in mundo, infra certa tempora, habent limitationem. And in a modern case the Court of K. B. said, the statutes of limitation operated as an extinguishment of the remedy of the one, not as giving the estate to the other.

Davenport v. Tyrrell,
Tit. 19. § 9.

3. By the old law, no seisin could be alleged by the demandant in a real action, but from the time of King Henry I. By the statute of Merton, 20 Hen. III., the seisin must have been alleged from the time of King Henry II.; and by the statute of Westm. 1. 3 Edw. I. c. 59., the seisin must have been alleged from the time of Richard I.

Statutes of Limitation,
1 Inst. 114 b.
2 Inst. 94.
Id. 238.

4. The period established by the last of these statutes increased every day, till at last it was scarce any limitation at all. So that it became necessary to fix a certain period of time within which a claim to lands and tenements must be made; and beyond which an undisturbed possession became a good title, by operating as a bar to every kind of action. This was effected by the statutes 32 Hen. VIII. c. 2. and 21 Ja. I. c. 16., which were made for the purpose of quieting the titles to estates, and avoiding suits; and have therefore been called statutes of repose.

3 Comm. 189.

5. The first section of the stat. 32 Hen. VIII. enacts, " That no manner of person or persons shall sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions,

As to Writs of Right.

portions, corrodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which shall be seised of the said manors, &c. within threescore years next before the teste of the same writ."

Dally v.
King,
1 H. Black.
R. 1.

6. In consequence of this clause, a writ of right cannot now be maintained by any person, without showing an actual seisin, by taking the esplees or profits, either in the demandant himself, or the ancestor under whom he claims, within sixty years.

As to pre-
scriptive
Rights.

7. As to incorporeal hereditaments, acquired by immemorial usage, the clause which has been just stated extends to them: therefore nothing can be now claimed by prescription, without showing a possession within sixty years.

As to Avow-
ries.

8. By the 4th section of this statute it is enacted, "That no person or persons shall make any avowry or cognizance for any rent, suit, or service, or allege any seisin of any rent, suit, or service, in the same avowry or cognizance, in the possession of his or their ancestors or predecessor or predecessors, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance."

Vide 3 Comm.
189. n.

9. This section only extends to rent, suit, and service; and not to such services as may not accrue within the time limited in it: of which an account will be given hereafter.

Béville's Case,
4 Rep. 6.

10. In the two sections of this statute which have been stated, the word seisin is used generally and indefinitely. But it has been resolved, that as to a

writ of right, it shall be intended of an actual seisin; and as to avowries, it shall extend to a seisin in law, as well as to a seisin in fact.

11. By the statute 21 Ja. I. c. 16. § 1. it is enacted, "That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time thereafter to be sued or brought, by occasion or means of any title or cause thereafter happening, shall be sued or taken within 20 years next after the title and cause of action first descended or fallen; and at no time after the said 20 years."

As to Writs of Formedon.

12. It has never been determined whether, under this statute, a person claiming an estate tail by descent, is barred by the neglect of the preceding person entitled to the estate tail, in not making an entry or bringing a writ of *formedon*, within 20 years from the time his title accrued.

It may be contended that he is not barred, because the issue in tail do not take in the character of heir to their immediate predecessor, but as issue of the body of the first donee, and described as such in the original gift of the estate tail; and are therefore not affected by any act of their ancestors. That where a person becomes entitled to an estate tail, as son, nephew, or cousin to the person last seised of it; a new title and cause of action first descends to him, as issue of the original donee, and so he is within the letter of the statute; and has a new period of 20 years to bring his *formedon*.

Tit. 29. c. 5.
§ 5.
1 Inst. 15 b.
3 Rep. 41 b.
1 P. Wms.
721.
2 Ves. 634.

That although a tenant in tail may bar his issue by fine, in consequence of the statutes made for that purpose, and by a common recovery, on account of the supposed recompence in value; yet that if he does not avail himself of those modes of barring his estate,

Tit. 35. 36.

it is still within the statute *De Donis*; and he cannot by any positive act of his, nor by his *laches*, destroy the rights of those who become entitled to it after his death.

13. The general opinion however is, that in consequence of the words *first descended*, if a person entitled to an estate tail neglects to bring his writ of *formedon* within 20 years after his title first descends, he and also his issue will be barred. For if the issue brings a *formedon*, it may be answered that the title first descended to his predecessor upwards of 20 years before.

This construction is confirmed by the opinion of the majority of the Judges in the case of *Stowell v. Zouch*, in which two of the Judges said, that if a tenant in tail was disseised, and the disseisor levied a fine, and five years passed, and afterwards the tenant in tail died, the issue in tail should have a new period of five years to make his claim; for a new right came to every one of them, *per formam doni*. But this opinion was utterly disallowed by the Chief Justices Dyer and Catline, who said that the word *first*, which ought to be added to the word *descend*, would not suffer every descent to have five years: Now the words of the statute of fines, 4 Hen. VII. upon which the above opinion of the majority of the Judges was founded, are nearly similar to those of the stat. 21 Ja. I.; and therefore it may be fairly presumed, that the Judges would adopt this reasoning, and give the same effect to the words *first descended*, in the stat. 21 Ja. I., as in the statute of fines.

14. The word *fallen* in this statute is clearly applicable to remainders and reversions. And it has always been held, that writs of *formedon* in remainder and reverter, may be brought at any time within 20

years after the determination of the preceding estate tail, though such preceding estate tail should have continued for centuries; because by such determination the title and action *first* descended and fell.

15. By the stat. 21 Ja. I. c. 16. § 1. it is enacted, As to Entry
upon Lands.
“ That no person or persons shall, at any time thereafter, make any entry into any lands, tenements, or hereditaments, but within 20 years next after his or their right or title, which shall first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry, after to be made.”

Under this clause all persons must enter within 20 years after their title accrues; and all persons entitled to estates tail in remainder, or to reversions in fee simple expectant on the determination of an estate tail, must enter within 20 years after the determination of such estate tail; because their title first accrued by such determination.

16. It is laid down by Mr. Serjeant Williams, that 1 Saund. R.
319 a.
an actual entry is not necessary to avoid the statute of limitations; for if an ejectment be brought within 20 years, no previous actual entry seemed necessary. But where an estate tail is discontinued, the estates Tit. 2, c. 2.
§ 6.
in remainder, and the reversion expectant thereon, are divested; and the issue in tail, as also the persons entitled to the estates in remainder, and to the reversion, are barred of their entry, but not of their real action.

17. A right of entry may also be taken away by a Lit. § 385:
descent, unless the heir labours under any of the disabilities which will be mentioned hereafter. But by the stat. 32 Hen. VIII. c. 68. it is enacted, that if any person disseises or turns another out of posses-

Carter v.
Tash,

1 Salk. 241.

1 Inst. 256 a.

Jd. 238 a.

1 Inst. 240 b.

Doe v.
Danvers,
infra.

Effect of
Twenty
Years Pos-
session.

Jenk. 16.

Stocker v.
Burney,
1 Ld. Raym.
741.
2 Salk. 421.

The Posses-
sion must be
adverse.

9 Rep. 106 a.
Tit. 35. c. 13.

sion, no descent to the heir of the disseisor shall take away the entry of him that has right to the land, unless the disseisor has peaceable possession for five years next after the disseisin.

18. Lord Coke says, this statute does not extend to any feoffee or donee of the disseisor, mediate or immediate; and that abators and intruders are out of it, because it is penal. It follows, that the descent of an estate from an abator or intruder to his heir, takes away the entry of the person having right, and puts him to his real action.

19. If a person seised of lands in fee devises the same to a stranger in fee, and dies, by which the freehold in law is cast upon the devisee, and the heir enters and dies seised, this descent shall not take away the entry of the devisee; for (says Lord Coke) he would then be utterly without remedy.

20. In consequence of the statute 21 Ja. I. a peaceable possession for 20 years takes away the right of entry. In which case a release of all actions will create a good title; for no writ of right can be brought for the fee simple after such a release.

21. An uninterrupted possession for 20 years, not only gives a right of possession which cannot be divested by entry, but also gives a right of entry. So that if a person who has such a possession is turned out of it, he may lawfully enter, and bring an ejectment for its recovery; upon which he will be entitled to judgement. Thus a possession for 20 years, in this case, forms a positive prescription.

22. No person can be barred by the statutes of limitation, unless he is out of possession. Thus it was laid down in a case respecting the statute of fines, which is in fact a statute of limitations, that

“he who has the estate or interest in him, cannot be put to his action, entry, or claim; for he has that which the action, entry, or claim would vest in or give him.” From which it follows, that no person can plead the statutes of limitation, unless his possession has been adverse to that of the person who claims against him.

23. Joint tenants, coparceners, and tenants in common, having a joint possession and occupation of the whole, it is settled, that the possession of any one of them is the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor will the bare perception of all the rents and profits by one, operate as an ouster of the other. Vide Tit. 18, 19, 20.

24. In ejectment, on a trial at bar, the statute of limitations was insisted on; but it was ruled by the Court, that the possession of one joint tenant was the possession of the other, so far as to prevent the statute of limitations. Ford v. Grey, 1 Salk. 285. 6 Mod. 44.

25. The same point was determined as to coparceners, in the case of Davenport v. Tyrrell; and as to tenants in common, in the case of Fairclain v. Shackleton, which have been already stated. Tit. 19. § 9. Tit. 20. § 16.

26. A person being seised in fee, having two daughters, devised his lands to his grandson, by his eldest daughter, in fee. The grandson died without issue. The heir of the grandson and the heir of the coparcener entered into the land, and took the profits by moieties, for 20 years together, upon the supposition that the devise was void for a moiety. The mistake being discovered, the heir of the grandson brought an ejectment against the heir of the other coparcener. Upon a special verdict, it was objected, that the bringing the ejectment against the heir of Reading v. Royston, 2 Salk. 422.

the coparcener for this moiety, admitted the plaintiff to be out of possession for 20 years, and then he was barred by the statute of limitations.

The Court, however, laid it down, that the statute of limitations never runs against a man, but where he is actually ousted or disseised; and true it was, one tenant in common might disseise another; but then it must be done by actual disseisin, and not by bare perception of the profits only.

27. Where lands are held by the rector of a parish, as a compensation for tithes, this will not be considered as an adverse possession.

Roe v.
Ferrars,
2 Bos. & Pull.
542.

28. In ejectment a verdict was found for the plaintiff, subject to the opinion of the Court, whether the plaintiff's right of recovery was not barred by the statute of limitations. The lessors of the plaintiff, who were lords of the manor of Beddington in Surry, sought to recover the lands as parcel of the manor, against the defendant, who was rector of the parish, and claimed them as parcel of the rectorial glebe. The lords of the manor had a right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times there had been a mutual exchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion, concerning their respective rights. To prove possession in the lessors of the plaintiff, a deed was produced, dated in 1703, by which the then lord of the manor demised to the rector the lands in question for 40 years, reserving a certain rent; and the rector covenanted with the lessor, that he and his heirs should have the tithe of oats of the parish. The rectors continued to hold the possession after the expiration of the lease, but withheld the rents for upwards of 20 years: the

lords of the manor continued to take the tithe of oats.

The Court was of opinion, that possibly, at the time when the rent was withheld, it was agreed between the then rector and the lord of the manor, that if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised; therefore that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of limitations.

Vide Doe v. Perkins, Tit. 35. c. 13.

29. Where a person has conveyed away the legal estate in lands to a trustee for himself, for any particular purpose, and continues to hold the possession, he becomes tenant at will to such trustee, and his possession not being adverse to the title of the trustee, the statute of limitations will not operate in such a case.

Keane v. Deardon, 8 East, 248.

30. Where there is a valid existing lease, the right of entry is postponed till such lease is determined; because the right to the possession first descends or accrues upon the determination of the lease. Nor is the plaintiff, in such a case, obliged to show that he has received any rent on the lease.

A Lease postpones the Right of Entry.

31. In ejectment for lands at Deptford in Kent, the lessor of the plaintiff claimed the estate as heir at law to John and Edmund Walthew, who had granted long leases of the premises, reserving rent; the leases expired in 1789, on which one Elizabeth Ellerbeck had entered in the name of herself and the lessor of the plaintiff; and Mr. Maddox the defendant had brought an ejectment, claiming not only by an assignment of the lease, under which he had got into possession, but also by a conveyance of the reversion, by lease and release, from the heirs of Dame Elizabeth

Orrell v. Maddox, Runn. Eject. App. No 1.

Blundell ; who, he stated, was the heir of John and Edmund Walthew.

Madox recovered the premises at Maidstone in 1791, and Mrs. Ellerbeck being thrown into gaol for the costs, died there ; but her sister made an entry, and brought an ejectment ; which was tried before Mr. Baron Hotham at Maidstone, in 1794, where she proved her right, as heir of John and Edmund Walthew.

For the defendant it was objected, that supposing the pedigree sufficiently proved, as there was a rent reserved on the leases, the lessor of the plaintiff was bound to show that she herself or some of the ancestors from whom she derived her title and descent, had received the rent within 20 years previous to the commencement of the action ; the Judge thinking *that* was necessary to prove a possessory title, the rent being in lieu of the land, considered the objection as fatal, and upon it nonsuited the plaintiff.

Mr. Serjeant Bond (from whose manuscript this case was taken) moved to set aside the nonsuit. He said it was a general question whether a person seised of a reversion expectant on a term for years, was bound, in order to entitle himself to recover in ejectment, to show, *as part of his case*, that he had actually been possessed, within any particular limits, of the rents reserved upon the leases. It would be admitted that if nothing was reserved, he could not be expected to show that any thing was received ; but as fealty was at least the implied service in all tenancies, if no rent, the party must show he had received fealty ; or if a pepper-corn was only reserved, he must prove seisin of it. Nothing of this was to be found in the statute of limitations, 21 Ja.I. that alone

could have given birth to this rule, which only directed that the entry must be made within 20 years after the title accrued ; and as ejectment only lay where the title of entry was found, it could only be brought within twenty years. That here the leases expired in 1789, consequently the ejectment being brought within twenty years after the title accrued, the statute was satisfied ; he concluded that all reference or analogy to this statute was false, and there was no rule of law which authorized the defendant's objection. If the rent had not been received, the same statute had taken away the remedy by action of debt, after six years, but not the right. The right remained to the rent, and, according to Foster's case, the older statute of limitations did not apply to a rent reserved by deed. The fact of payment was not a requisite or direct point to be proved in this action ; he did not undertake to make out that he was entitled to the rent, he only was to show he was entitled to the possession, the term being elapsed.

In real actions sometimes esplees were part of the demandant's case, as in a writ of right ; but in others, as in *cessavit* or escheat, where they claimed a seignior or reversion, none were alleged. That non-receipt of rent in that line of descent, in which plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiff ; but if the defendant had shown this, the plaintiffs might have rebutted such a presumption by evidence in reply. That, at all events, not receiving the rent was only a question for the jury, and could not warrant a non-suit, as if it was as necessary a requisite, as proof of a conversion in trover, or of esplees in a writ of right.

Bro. Ab.
Esplees, 5.

The Court set aside the nonsuit, Lord Kenyon going very much on Bond's argument.

Doe v.
Danvers,
7 East, 299.

32. Thomazine Taylor being tenant in fee simple of a customary estate, held of the manor of Stepney, demised the same to D. Whiting for 41 years, with a proviso for re-entry on nonpayment of the rent. The lessor died in 1780, and in 1782 Thomas Danvers was admitted as her heir, to the said premises.

The plaintiff claimed under the will of T. Taylor, but though the testatrix died in 1780, and the will was established in 1782, yet owing to the lease, which did not expire till June 1800, the devisee did not enter or bring an ejectment till Hil. Term 1802; but suffered the heir at law of the testatrix, who was admitted to the premises, and afterwards the defendant his son, to whom they descended in 1791, to take the rent during the intermediate time; and this though there was a proviso in the lease for re-entry in case of nonpayment of rent.

It was contended on behalf of the defendant, that taking this to be freehold, the lessor of the plaintiff was barred by his laches; and it was no answer to say that the outstanding lease, which continued to run till Midsummer 1800, prevented his entry before; for it was still competent to him to have entered, without committing a trespass; as to demand rent or fealty, or to obtain seisin of the freehold.

Mr. Justice Lawrence.—“Must not an entry, to avoid the statute of limitations, be an entry for the purpose of taking possession; and how could the lessor have lawfully entered for that purpose during the continuance of the lease.”

If this were so, a right of entry might be preserved, even after an ouster of the rents and profits for above 60 or 100 years, which would entirely defeat the ob-

ject of the statute, which was to quiet men's possession; and it would be incongruous to hold that an ejectment might be maintained, after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will. The tenant in possession, according to *Taylor v. Horde*, enjoyed as the covenanted bailiff of the tenant of the freehold; and as a recovery of a term did not displace the freehold, so, according to Lit. § 411, there might be a disseisin of the freehold, pending the term, which should be no ouster of the term; but *Taylor v. Horde* showed that a mere entry on the land for another purpose did not operate as a disseisin of the tenant in possession, so as to make a good tenant to the *precipue*. 1 Burr. 113.
Tit. 36. c. 2.

Lord Ellenborough.—“Disseisin is said to be a personal trespass, a tortious ouster of the seisin of another, and in *Salk. 256*. Lord Holt says, that there can be no disseisin without an actual expulsion; but can you show that the devisee could have entered to vest the seisin in herself, without committing a trespass upon the tenant in possession? because the law does not require a person to do that, which would make him a wrong doer.”

She might have had a writ of entry during the continuance of the lease, for the purpose of asserting and establishing her right. Ouster of seisin was distinct from ouster of possession. Receipt of rent by a stranger was a disseisin, yet there was no ouster of possession; and at any rate there might have been a symbolical delivery of customary lands in lease, by admittance, subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is, *ut haberet seisinam*, &c. without saying any thing of the possession; and there the demandant

counted on his seisin, and not upon possession, as in ejectment. If the fact of the lands being in lease did not bar the seisin of the owner, there was no reason why it should bar his entry, for the purpose of giving him seisin. The devisee might have justified, in trespass brought by the tenant, that she entered in order to vest the seisin in herself, or to assert her right, whatever it might be, against the party claiming and taking the rent, and not to oust the tenant; she might also have entered to distrain for the rent; and at all events, as there was a clause in the lease for re-entry, in default of payment of the rent, the devisee might have availed herself of the forfeiture, to enter and keep possession, above 20 years before.

The statute of limitations had always been construed favourably, with a view to quiet possessions; and the question whether receipt of rent by one tenant in common for above 20 years, were an ouster of his companion, could never have occurred, if an adverse receipt of rent for such a length of time had not been considered as a bar. Now here the defendant, and his father before him, had an adverse possession, by receipt of the rent, for above 20 years; which was not only a bar to the lessor's remedy by ejectment, but gave the defendant a title to the possession, from whence he could only be removed by a real action; and this distinguished the case from that of *Orrell v. Madox*, where the only question was, whether it were necessary for the lessor of the plaintiff to show a receipt of rent within twenty years, on an outstanding lease; which was holden not to be necessary.

ante, § 31.

On the part of the lessor of the plaintiff it was insisted, that no other right or title of entry was within the statute of limitations, except that which was ac-

accompanied by a right of possession, which the lessor could not have, pending the lease ; and the payment of the rent during part of the time to the defendant and his father, would not of itself make the holding of the tenant wrongful, but it still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture, and re-enter for the condition broken. The Court was of this opinion, and gave judgement for the plaintiff.

33. If a lease be void, or considered as a trust for the person entitled to the inheritance, it will not postpone the right of entry.

34. By an indenture of settlement made in the year 1668, the estates in question were limited to the use of Sir Robert Atkyns the elder, for life, remainder to Sir R. Atkyns the younger, and the heirs male of his body by his then intended wife, remainder to the right heirs of Sir R. Atkyns the elder ; with a power to Sir R. Atkyns the elder, and Sir R. Atkyns the younger, when they should be respectively in possession, to demise the said premises to any person or persons, for one, two, or three lives, reserving the usual rents ; and also a power to Sir R. Atkyns the father, to limit the premises to the use of any woman he should marry for her life, by way of jointure. Sir R. Atkyns the father, in 1681, made an appointment of the premises, by way of jointure, to Ann Dacres for her life, and soon after married her.

Taylor v.
Horde,
1 Burr. 60.

Sir R. Atkyns the father, by indenture dated in 1698, under his hand and seal, attested by three witnesses, and made between himself of the one part, and Thomas Dacres, R. Dacres, and J. Dacres, of the other part, reciting his power of leasing, in consideration of the rent reserved, and in pursuance of the said power, demised the premises to Thomas, Robert,

and John Dacres, and their assigns, for and during their natural lives, and the life of the longer liver of them, reserving a yearly rent of 360*l.*, in which lease was contained the following clause:—"The true intent and meaning of this estate or term for lives, so hereby granted and made to the said Thomas Dacres, R. Dacres, and J. Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises, by the said recited indenture, to the right heirs of the said Sir Robert Atkyns the father, and to such person or persons to whom the said Sir R. Atkyns shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done, for the barring of the same."

John Dacres alone executed a letter of attorney reciting the said lease, and empowered Thomas Barker to take livery of the premises from Sir Robert Atkyns the father, for himself and for Thomas and Robert and every of them in their names, and for their use, according to the purport of the said indenture; and to enter and take possession of the said premises, to the use of them and every of them.

Sir R. Atkyns delivered seisin of the premises to Barker, to the use of Thomas, Robert, and John Dacres; but the lessees were never in possession of the premises otherwise than by the said livery; nor did they ever receive or pay any rent, in respect of the said premises; and the lease was not found in the custody of Thomas Dacres, the surviving lessee, at the time of his death.

Sir R. Atkyns the father made his will in 1708, whereby he devised his reversion in fee in the premises in question, and also the lease made to the Dacres, to John Tracy, the lessor of the plaintiff, who after-

wards took the name of Atkyns, in tail, with several remainders over; and died in 1709, whereupon his widow entered on the premises, claiming the same for her life as her jointure.

Sir R. Atkyns the younger brought an ejectment against his father's widow, for the recovery of the premises in question; when a verdict was found for the plaintiff, and judgement entered up accordingly. Soon after which, Sir Robert Atkyns the son entered into and was in possession of the premises, and by feoffment conveyed the same to a tenant to the *precipe*, and suffered a common recovery.

Sir R. Atkyns continued in possession till November 1711, when he died without issue male.

Robert Atkyns, who was nephew and heir at law of Sir R. Atkyns, the son, entered into the premises, upon the death of Dame Ann Atkyns the widow of Sir R. Atkyns the father, who had recovered the premises in ejectment, as her jointure.

Robert Atkyns died in possession in 1759; and Thomas Dacres, the survivor of the three persons named in the lease, died in 1752.

John Atkyns the lessor of the plaintiff never was in possession of the premises till 1752, when he entered, claiming as devisee under the will of Sir Robert Atkyns the father, and demised to the plaintiff.

Two great questions arose upon this case: 1st, Whether the recovery was good. 2dly, Whether, supposing the recovery was bad, the plaintiff was barred by the statute of limitations.

The Court of King's Bench being of opinion that the recovery was bad, it then became necessary to determine whether the lessor of the plaintiff had made an entry within twenty years after his title accrued; Vide Tit. 36. c. 2.

for otherwise he was barred of his remedy by the statute of limitations.

Lord Mansfield delivered the opinion of the Court. He said, an ejectment was a possessory remedy, and only competent when the lessor of the plaintiff might enter; therefore it was always necessary for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession was a positive title to the defendant. It was not a bar to the action, or remedy of the plaintiff only, but took away his right of possession; every plaintiff in ejectment must show a right of possession, as well as of property, therefore the defendant need not plead the statute as in the case of actions. The question then was, whether it appeared that the lessor of the plaintiff might enter when he brought the ejectment. Sir R. Atkyns died without issue male in 1711, and in 1712 Lady Atkyns, the jointress died. Then accrued the title of the lessor of the plaintiff; his only excuse for not entering was, that he was prevented by the lease to the three Dacres. That upon the death of Thomas Dacres, the surviving lessee, in 1752, a new title of entry accrued, upon which he entered and brought his ejectment. Three answers were given, any one of which, if well founded, was sufficient. 1. That the lease was absolutely void, and of no effect. 2. If good, it determined by the estate tail being spent, by the express tenor of the demise. 3. If subsisting, yet upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title ~~deeds~~; therefore could not stop the statute's running, to pro-

fect an adverse possession, nor give him any new right of entry.

1°. That the lease was void. Sir R. Atkyns the father being only tenant for life, could by virtue of his ownership make no estate to continue after his death: this lease, therefore, after his death could only be supported by his power, if it was made pursuant to it. It was no lease at all: the very definition of a lease was, a contract between landlord and tenant, by which both were bound in mutual stipulations: it professed being made by Sir R. Atkyns on the one part, and the three Dacres on the other part, but it was not: the Dacres were not bound, they never executed it, or any counterpart. It did not appear they knew or consented to the making of it. The deed never was out of Sir R. Atkyns's own possession. It was not found that the best rent was reserved, nor was there a covenant for payment of the rent. Vide Tit. 32. c. 15.

2°. Supposing this pocket undelivered grant of the ideal incorporeal freehold, a good execution of the power, it was argued that it determined with the estate tail; the only cause of the grant being, to preserve the reversion during the estate tail, which qualified the grant, and amounted to a limitation: there being no technical words necessary to express a contingency upon which an estate for lives might sooner determine. The deed might have said expressly, "if the heirs male of Sir Robert Atkyns the son continue so long," or, "that the lease should determine, if during the lives the estate tail should be spent:" and the intent of the deed, plainly expressed, was tantamount.

3°. Suppose it subsisted; it was a *sa* trust, and disposed of as such, to attend the inheritance of the

lessor of the plaintiff, which came into possession in 1712, when his title and right of entry accrued. The lease was one of his muniments; a mere weapon in his hands: and it would be going a great way to say that such a form should take from an adverse possession the benefit of the statute. But the Court was clear, that at the trial a surrender of such a lease might and ought to be presumed, to let in the statute of limitations. The special verdict not having found such surrender, the Court could not come at the justice of the case in that shape. It was unnecessary to go into that point, or the former: and it would be very improper unnecessarily to do it. If the Dacres had no estate by virtue of the demise in 1712, then the ejectment was not brought within 20 years after the lessor's title accrued; and no facts were found to excuse him within any of the exceptions. Therefore the Court was unanimously of opinion, that there should be judgement for the defendants.

6 Bro. Parl.
Ca. 633.

A writ of error was brought in the House of Lords, and the Judges being ordered to attend, the following question was proposed to them:—"Whether sufficient appeared by the special verdict in this case, to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21st of King James the First, from recovering in the ejectment?" Whereupon the Lord Chief Justice Willes, having conferred with the rest of the Judges, delivered their unanimous answer,—"That sufficient did appear by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21. Ja. I., from recovering in the ejectment." Whereupon the judgement of the Court of King's Bench was affirmed.

35. Where a person acquires a second right, he is allowed a new period of twenty years to pursue his remedy; though he has neglected the first. It being a maxim of law, *Quando dua jura in una persona concurrent, æquum est ac si essent in diversis.*

Where a Second Right accrues, a new Entry is given.

36. A tenant in tail of lands held in ancient demesne, conveyed them by fine, in the court of ancient demesne, to three persons for their lives; he afterwards levied another fine of the reversion, in the same court, to the use of himself and his heirs.

Hunt v. Bourne,
1 Salk. 339.
2 Salk. 421.

It was determined, that the first fine created a discontinuance of the estate, and took away the entry of the issue in tail, during the lives of the three persons to whom the first fine was levied; but that the second fine did not make any discontinuance: therefore, although the issue in tail had neglected to bring his *formedon* within twenty years after the death of his ancestor, when his right first accrued, yet when the last life dropped, the discontinuance was determined, and the heir acquired a new right of entry; for the pursuit of which he was allowed by the statute 21 Jac. I. a new period of twenty years: for when a person has a right, and several remedies, the discharge of one is not the discharge of the other; and the word right in the statute means a right of entry.

Upon a writ of error in the House of Lords, it was contended for the plaintiff, 1°. That the fine did not create a discontinuance, the consequence of which was, that the right of entry of the issue in tail commenced immediately on the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered: therefore his entry was barred by the statute of limitations.

4 Bro. Parl.
Ca. 66.
Vide Tit. 35.

2. Th at the discontinuance, if any, did not determine with the estate for three lives, but still continued

to bar the entry of the issue in tail, by the common law; because a fee passed by the first fine to the cognizee, therefore the discontinuance was of the whole fee: but if the first fine alone did not work a discontinuance in fee, yet the second fine and warranty did, in order that the warranty might be preserved.

8°. That the entry was barred by the statute of limitations, which enacted, that no person should enter into lands but within twenty years after his right or title should first descend or accrue. In this case the first right or title that descended was a right of action, viz. to a *formedon*, which accrued to the issue immediately on the death of the tenant in tail, which happened above thirty-five years before; and the issue having neglected for above twenty years to sue for the estate, was thereby barred, not only of his action, but of his entry also; for otherwise, a man might enter into lands, when he had no way by law to recover them, having lost that remedy by his own default; which would be absurd and inconvenient, with respect to purchasers, and the disturbance of long possessors.

On the other side it was contended, that the only question in the case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine; for it was not pretended that a fine, levied in a court of ancient demesne, would bar an estate tail. That the first fine made a discontinuance of the estate, and took away the entry of the tenant in tail, during the lives of the lessees only; but that the grant of the reversion by the second fine, did not make a discontinuance in fee; consequently, when the last life dropped, in 1698, the discontinuance was determined, and the right of entry revived; therefore the issue in

tail might lawfully enter, and was not barred by the statute of limitations, his right not accruing till 1693. The judgement was affirmed.

37. It is said by Lord Hardwicke, that a remainder-man expectant on an estate for life or years, to whom a right to enter, or bring an ejectment, is given by the forfeiture of the tenant for life or years, is not bound to do so: therefore if he comes within his time, after the remainder attached, it will be good; nor can the statute of limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. 1 Vesey, 278.
Vide Tit. 35.
c. 11.

38. With respect to the entry which is required to preserve a right of possession, it has been resolved, that in proving an entry or claim, it is necessary to produce evidence of its having been made upon the land claimed; unless there be a special reason to the contrary; and also that it was not a casual entry, but made *animò clamandi*. The Entry
must be on
the Land.

Ford v. Grey,
6 Mod. 44.

39. If a person is prevented by force or violence from entering on lands, he must then make his claim as near the land as he can; which in that case will be as effectual as if he had made an actual entry. Lit. § 419.
1 Inst. 253 b.

40. If a person, having a right of entry into a freehold estate, enters upon part of it, such entry will be adjudged good for all possessed by one tenant; but where there are several tenants, there must be entries on each of them: a special entry into a house, with which lands are occupied, claiming the whole, is however a good entry as to the lands. 1 Lill. Ab.
516.

41. On a special verdict, the single question was, whether the entry of *cestui que trust* would be sufficient to avoid the statute of limitations of 21 Ja. I. It was held clearly by the whole Court, that such entry was Greav. Rolle,
1 Ld. Raym.
716.

sufficient to avoid the statute ; and that they would not hear any argument on the point.

And followed
by an Action.

42. By the stat. 4 Ann. c. 16. § 16. it is enacted, that no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be sufficient within the statute of limitations, unless upon such entry or claim an action shall be commenced within one year after the making of such entry or claim, and be prosecuted with effect.

Savings in
the Stat.
21 Jac.

43. By the stat. 21 Ja. I. c. 16. § 2. it is provided, “ that if any person or persons that shall be entitled to such writ or writs, or that shall have such right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action or make his entry, as he might have done before this act ; so as such person and persons, or his or their heir or heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

Doe v. Jones,
Tit. 35. c. 11.

44. Upon the construction of this clause, it has been held that the disabilities here mentioned must exist at the time when the right first accrues ; for if the time once begins to run, no subsequent disability will avail.

Doe v. Jesson,
6 East, 80.
Cottrell v.
Dutton,
4 Taunt. 826.

45. In a modern case, where the ancestor died seised, leaving a son and a daughter infants, and on the death of the ancestor, a stranger entered ; the

son soon after went to sea, and was supposed to have died abroad, within age. It was held that the daughter was not entitled to twenty years, to make her entry after the death of her brother, but only to ten years: more than twenty years having elapsed in the whole since the death of the person last seised.

46. All natural persons, and all estates in land, whether freehold or leasehold, are within the statutes of limitation; as also customary rents, of which seisin is the proper proof; and suit and service to a court baron.

47. It is said by Lord C. B. Gilbert, that the statutes of limitation extend to copyhold estates; being made for the preservation of public quiet; and no ways tending to the prejudice of the lord or tenant: that actions concerning copyholds are as fully and plainly within the words of these acts, as any other actions; so there is no reason to exclude them from the meaning. And Lord Kenyon held, that in the case of a copyhold, there could be no entry for a forfeiture after twenty years.

48. Offices with fees and profits are within the intent and meaning of the statutes of limitation. Thus in the contest which took place in the House of Lords in 1781, for the office of Great Chamberlain of England, the Judges being asked whether the right of Lord Percy to that office was barred by the statute of limitation, they answered, that there having been an adverse possession of more than sixty years against him, without any actual seisin in him or his ancestors, his right would be barred in any real action by the statute of limitation.

49. There are several persons and estates that are not comprehended within the statutes of limitation;

To what Persons and Estates these Statutes extend.

2 Inst. 95.
Eldridge v. Knott,
Cowp. 214.
Ten. 173.

3 Term R.
132.

Tit. 25. § 70.

Lords Journ.
vol. 36. 295.

What are not within them.

which are therefore not affected by a nonclaim for any indefinite period.

Ecclesiastical
Corpora-
tions.

50. Ecclesiastical corporations, and generally all ecclesiastical persons, seised in right of their churches, being restrained from alienation by several positive laws, are not within any of the statutes of limitation; and therefore cannot bar their successors by neglecting to bring actions for recovery of their possessions within the time prescribed by these statutes: but an ecclesiastical person, who is guilty of this neglect, will himself be barred.

Magdalen
Coll. Case,
Tit. 35.

Plowd. 358.

Advowsons.

51. There is no limitation as to the time within which any action touching advowsons is to be brought; at least none later than the time of Rich. I. For by the statute 1 Mary, § 4. it is enacted, that the statute 32 Hen. VIII. shall not extend to a writ of right of advowson, *quare impedit, darrein presentment, &c.* And by the statute 7 Ann. c. 18. it is enacted, that no usurpation shall displace the estate of the patron; and that he may present on the next avoidance, as though there had not been any usurpation; which provision in effect takes away all limitations of suits about the right of patronage.

1 Inst. 115 a.
n.

Tithes.
Quilter v.
Mussendine,
Gilb. R. 228.
Tit. 22. § 95.

52. Tithes belonging to the church are not within the statutes of limitation, because the nonclaim of the former rectors of a parish cannot prejudice their successors. Nor can a prescription *de non decimando* be set up against a lay impropiator; though long possession of a portion of tithes will create a title.

Dignities.
Tit. 26. c. 2.
§ 51.

53. Dignities or titles of honour are not within any of the statutes of limitation, as has been already shown.

Rents created
by Deed.

54. It has been shown that customary and prescriptive rents are comprised within these statutes:

but where a rent is created by deed or grant, of which the commencement can be shown, it is not within them.

1 Inst. 115 a.
2 Vern. 235.
10 Ves. 467.

55. A. by deed indented made a feoffment in fee to B. and his heirs, rendering 10s. a year rent to A. and his heirs; of which rent the heirs of A. had not been seised for 40 years. It was determined that they might notwithstanding distrain for it: for the statute 32 Hen. VIII. was intended to operate only where the avowant was driven to allege a seisin by force of some old statute of limitation; and that was when the seisin was material, and of such force that it should not be avoided in avowry, although it were by encroachment, as between the lord and tenant. But in the case of reservation or grant of a rent, there the deed is the title, and the beginning thereof appears: no encroachment in that case shall hurt, nor is any seisin material. And this construction stands with the words of the act—"No man shall make avowry and allege seisin, &c."; by which it appears that that branch extends only where the avowant ought to allege seisin. But where no seisin is requisite, it is out of the words and intent of the act; for it intends to limit a time for the seisin, which seisin is required by law to be alleged; and not to compel any one to allege seisin, where seisin was not necessary before.

Foster's Case,
8 Rep. 64.

56. The exemption of rent out of the statute 32 Hen. VIII. should be understood with this qualification; that the certainty of the rent should appear in the deed; because otherwise the *quantum* of the rent is no more ascertained by the deed, than if there was not one existing. If therefore the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays

1 Inst. 115 a.
"

over, without expressing what that is; and the latter not having commenced by deed, is one of which seisin is the proper proof. In such a case seisin is equally necessary to both rents; consequently both ought to be equally deemed within this statute.

Collins v.
Goodall,
2 Vern. 235.

Fealty, &c.
1 Inst. 115 a.
2 — 95.
4 Rep. 10 b.

57. Fealty is within the letter of the stat. 32 Hen. VIII.: yet Lord Coke says that fealty and all other incidental services; such as heriot service, or to cover the lord's hall, and the like; for that they might not happen within the times limited by that act; were, by construction, out of the meaning of it.

Bennet v.
King,
3 Lev. 21.

Bond Debts,
&c.
1 Burr. 434.
Oswald v.
Legh,
1 Term R.
270.

58. Bond debts and other specialties, are not within the statutes of limitation. But where an action is brought on a bond, and the money does not appear to have been demanded, or the interest, within 20 years, this amounts to a presumption that it has been paid.

Nullum
tempus Act.

59. We have seen that at common law no prescription could be maintained against the King; nor was he bound by the stat. 32 Hen. VIII.: and this privilege extended to his lessee.

Lee v.
Norris,
Cro. Eliz.
331.
Run. Eject.
59.

60. Thus where A. having a lease from the Crown for 99 years, and being out of possession for more than 20 years, he notwithstanding recovered in ejectment; for A.'s possession was that of the King, against whom the want of possession could not be legally objected.

61. By the statute 21 Ja. I. c. 2. it was enacted, that a quiet and uninterrupted enjoyment, for 60 years before the passing of that act, of any estate originally derived from the Crown, should bar the Crown from any right or suit to recover such estate, under pretence of any flaw in the grant, or other defect of title. This act, at the time it was made, secured the rights of such as could then prove a pos-

session of 60 years; but, from its nature, was continually diminishing in its effect, and departing from its principle; so that some new law became every day more necessary, to secure the possessions of the subject from the claims of the Crown.

62. It was therefore enacted by the statute 9 Geo. III. c. 16.—“ That the King’s Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (other than liberties or franchises) or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand for or into the same, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue and grow, within the space of 60 years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof; unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same rents, issues, and profits of any honour, manor, or other hereditaments whereof the premises in question shall be part or parcel, within the space of 60 years; or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs

or successors, or have or shall have stood *insuper* of record, within the said space of 60 years."

Where
Equity adopts
the Doctrine
of Limita-
tions.

Treat of Eq.
B. 3. c. 1. § 7.
15 Ves. 496.
10 — 466.

63. The statutes of limitation only fix certain periods within which different real and personal actions may be brought, in the courts of common law; and therefore do not extend to suits in equity. But the limitation of suits being founded in public convenience, and attended with so much utility, the courts of equity have adopted the principles established by these statutes, as positive rules for their conduct.

Tit. 15. c. 3.
§ 56.

64. Thus it has been long settled, that where a mortgagee has been in possession for 20 years, without claim, that circumstance may be pleaded to a bill for redemption; unless there be an excuse by reason of imprisonment, infancy, coverture, or absence. For as 20 years possession barred an entry and ejectment, there was the same reason for allowing it to bar a redemption. It follows that 20 years possession constitutes a good title in equity; because the only remedy there, is by bill.

Anst. Rep.
vol. 1. 138.
vol. 3. 755.

Smith v.
Clay, 3 Bro.
R. 639. note.

65. Upon a bill of review brought between 30 and 40 years after the decree pronounced, Lord Camden said, that as often as parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery had adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance *laches* beyond the period to which they were confined by parliament. Therefore in all cases where the legal right had been barred by parliament, the equitable right to the same thing had been concluded by the same bar. The House of Lords had therefore determined, that 20

Edwards v.
Carrol,
2 Bro. Parl.
Ca. 98.

years should bar a bill of revivor, because the statute of Will. III. had barred all writs of error after that period. Vide Tit. 35.

66. There are, however, several cases in which courts of equity have refused to adopt the principles of the statutes of limitation. Thus it is generally said, that a trust is not within the statutes of limitation; but this proposition only applies to cases arising between a *cestui que trust* and his trustee, where there is no adverse possession. And Lord Hardwicke has said, that this rule does not hold between the *cestui que trust* and trustee on the one side, and strangers on the other: for that would be to make the statute of no force at all; because there was hardly any estate of consequence without such trust; and so the act would never take place. Therefore, where a *cestui que trust* and his trustee, were both out of possession for the time limited, the party in possession had a good bar against both of them. Llewellyn v. Mackworth, 15 Vin. Ab. 125.

67. Where fraud is charged, the defendant cannot plead the statute of limitations to the discovery of his title, but must answer to the fraud.

68. A bill was brought for a discovery of the defendant's title, charging fraud in the defendant, and praying to be let into possession of the estate; the defendant pleaded the statute of limitations, both to the discovery and relief. Bicknell v. Gough, 3 Atk. 558.

Lord Hardwicke was of opinion that the defendant could not plead the statute of limitations to the discovery; but must answer the fraud: that as the defendant had pleaded it, it was in the nature of a demurrer; for the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own showing; if he was to

allow the plea, the plaintiff could not take exceptions to the answer, and therefore overruled the plea.

15 Vin. Ab.
125. pl. 8.

69. In another case Lord Hardwicke is reported to have said—"There may be a case where the circumstance of concealing a deed shall prevent the statute's barring; but there it must be a voluntary and fraudulent detaining; for to say that merely having an old deed in one's possession, shall deprive a man of the benefit of the act, is going too far; and would be a hard construction of a statute for quieting possessions: it must therefore be an intentional concealment."

1 Vern. 256.

70. A legacy given out of real property is only recoverable in a court of equity, and therefore is not within the statutes of limitation; from which it follows, that length of time alone will not bar it; but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive.

Fotherby v.
Hartridge,
2 Vern. 21.

Jones v.
Tuberville,
2 Ves. Jun.
11.

71. In a modern case, where a bill was brought for the payment of a legacy, which was resisted on the ground of presumed payment, arising from the length of time that had elapsed without any demand, which was above 40 years; and because the representatives both real and personal, and all the persons who could throw any light on the subject, were dead; Lord Commissioner Eyre said—"It is a presumption of fact, in legal proceedings before juries, that claims, the most solemnly established on the face of them, will be presumed to be satisfied, after a certain length of time. Courts of equity would do very ill by not adopting that rule, so essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is

better for the ends of general justice, that the presumption should be made and favoured, and not be easily rebutted, than to let in evidence of demands of this nature, from which infinite mischief and injustice might arise.

The Court presumed that the legacy was paid, and dismissed the bill.

72. It is said, that if a person sues in Chancery, and pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at law, the Court will preserve the plaintiff's right, and will direct that the defendant shall not plead the statute of limitations in bar to the demand. But in another case it was said that the Court of Chancery would allow the statute of limitations to be pleaded, unless the party in such suit was stayed by act of the Court, as by an injunction.

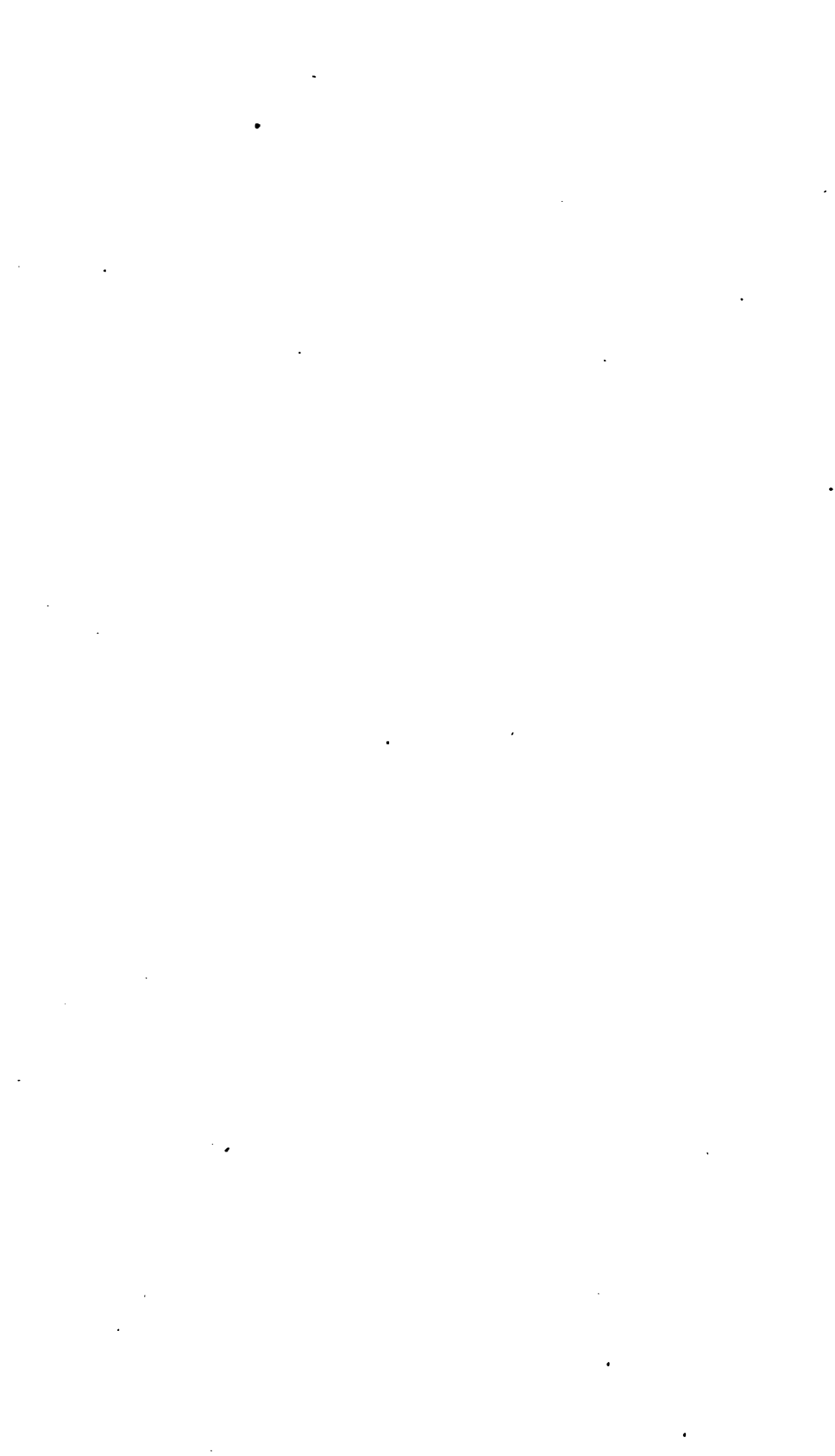
Gilbert v. Emerton,
2 Vern. 503.

Mackenzie v. Powis,
7 Bro. Parl. Ca. 282.

Anon. 2 Cha. Ca. 217.
Tit. 35. c. 14.

END OF THE THIRD VOLUME.









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